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No. 93-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,
v.
REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS C.D. AMBROSIA TRUCKING COMPANY, ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION, AND TAURO BROTHERS TRUCKING COMPANY

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QUESTIONS PRESENTED

1. Whether the holding of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), should be expanded to bar antitrust damages for any party—customer or competitor—when: (a) plaintiffs did not challenge the lawfulness of any rate filed with the Interstate Commerce Commission and did not seek any rebate of alleged filed-rate overcharges; (b) damages were not measured by reference to hypothetical regulated railroad rates; (c) the jury was specifically instructed that liability could not be premised on rate-related claims; and (d) the court of appeals "conclude[d] from the evidence produced that . . . plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims."

2. Whether, assuming *Keogh* is expanded to bar such antitrust damage claims by shippers, it should *further* be expanded to bar damages for competitors, where: (a) this Court's decisions and those of the lower courts have consistently declined to apply *Keogh* to competitor claims; (b) the competitor claims do not create the risk of discriminatory rebates that was the concern in *Keogh*, and (c) the competitors' claims are not measured by reference to hypothetical rates that would require Interstate Commerce Commission approval.

3. Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), should be extended to bar the antitrust damage claims of the steel company plaintiffs, notwithstanding that the court of appeals in this and a related case held those steel companies to be directly-injured victims of a conspiracy to exclude competition.

RULE 29 STATEMENT

Pursuant to Rule 29.1, there are no parent or subsidiary corporations to be listed.

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Respondents C.D. Ambrosia Trucking Company (Ambrosia), Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie), and Tauro Brothers Trucking Company (Tauro) respectfully oppose the petition for certiorari.

STATEMENT

There is nothing "extraordinary" about this antitrust case—except, perhaps, the audacity and scope of the illegal conduct at issue. In a 1989 jury verdict, Petitioner Bessemer & Lake Erie Railroad (B&LE) was held responsible for its leading role in a destructive 25-year

conspiracy that unlawfully monopolized the transportation of iron ore to this nation's steel mills.[1] In a prior criminal case, B&LE pled *nolo contendere* to antitrust charges based on its role in the conspiracy. *See United States v. Bessemer and Lake Erie Ry. Co.*, 717 F.2d 593 (D.C. Cir. 1983).

The Third Circuit's judgment in this case does not warrant plenary review. B&LE does not dispute the trial court's finding that "[l]iterally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy."[2] Nor does B&LE challenge the Third Circuit's holding, agreeing with the D.C. Circuit in the criminal case, that the Interstate Commerce Act afforded the conspirators no antitrust immunity. B&LE neither denies its role in the conspiracy nor questions the fairness of the proceedings that awarded compensation for its effect. B&LE instead asks this Court to immunize its misconduct from treble damages through a sweeping extension of the *Keogh* doctrine. Even with respect to this issue, however, B&LE does not challenge the instructions given the jury. Instead, B&LE seeks to manufacture a need for plenary review by presenting an incomplete and seriously distorted picture of what was decided below.

A. The Facts

Traditionally, iron ore in mud-like form was transported from mines in Michigan, Minnesota and eastern Canada across the Great Lakes on ships known as "bulk-

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[1] Although B&LE describes itself as a "small, 200-mile railroad," it was one of the largest carriers of iron ore in the nation during the period in question, and was established for the principal purpose of transporting ore from Lake Erie to the steel mills of Ohio and Pennsylvania.

[2] Appendix to Petition for Certiorari (Pet. App.), 97a (opinion denying motion for judgment notwithstanding the verdict).

ers." On arrival at docks on the south shore of Lake Erie, the ore was unloaded by huge and extremely expensive equipment, including large cranes known as huletts. From the docks, B&LE and other railroads transported the ore to steel mills in Ohio and Pennsylvania.[3] So long as ore remained in mud form, this transportation system was largely insulated from competition because the railroads controlled the huletts needed to unload the "bulker" ships, and the rail lines from the docks to the mills.

In the early 1950s, the advent of "pelletized" ore portended three important changes in ore transportation. First, because pelletized ore could be unloaded with a conveyor belt carried on the ship (rather than huletts on the docks), a larger and more efficient type of vessel—the "self-unloader"—could replace traditional bulkers. Second, because huletts and other heavy equipment were no longer necessary to unload ore, "private docks" not owned by the railroads could compete for iron ore business without facing the entry barrier of prohibitive capital investments. Third, because railroads could not bar private docks from dealing with motor carriers, trucks could compete with railroads for transportation of ore to the mills. Pelletized ore therefore made possible a new transportation system—self-unloaders, private docks, and trucks—that could move ore at a cost far lower than the monopoly rates charged by the railroads.

The railroads' own documents demonstrate their collective determination to squelch this threat to their monop-

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[3] Other railroads, including the New York Central (NYC), the Chesapeake & Ohio Railway Co. (C&O), the Baltimore & Ohio Railroad Company (B&O), the Norfolk & Western Railway Company (N&W), Penn Central Corp., and the Consolidated Rail Corporation (Conrail), also transported ore and were defendants in this case. Defendants other than B&LE settled before trial, or were dismissed from the case.

Self-unloaders could unload ore at almost any dock and could do so far more efficiently than the railroad-controlled system. Because these vessels, and not the dock, performed the unloading services, self-unloaders were direct competitors of the railroad docks. *Id.*; CA App. 2754, 4067.

2. B&LE and its co-conspirators quickly perceived their vulnerability to competition from an efficient, less costly alternative system. Beginning in 1956, in a series of secret meetings, that deliberately avoided ICC-mandated procedures governing rate bureaus, high-ranking railroad officials concluded that "something must be done to overcome the threat such inexpensive [non-railroad] facilities, which could spring up anywhere, are to our established ore facilities and charges." CA App. 6462. Recognizing that the new system depended on the availability of three interdependent components (self-unloaders, dock services and inland transportation), B&LE and the other railroads jointly attacked all three. Pet. App. 19a. For the next 25 years, B&LE and its co-conspirators adhered to, carried out and enforced their oral agreements by, among other means:

• Refusals to sell or lease property to non-railroad firms interested in offering low-cost self-unloader service to steel companies, and covenants or lease restrictions prohibiting use of property for such purposes. Pet. App. 19a; CA App. 3011-3013, 6589, 6888-89, 6900, 6904, 7155, 7952. Evidence at trial showed numerous sites along Lake Erie where the conspirators directly thwarted efforts to establish private iron ore docks. *See, e.g., id.* at 6888, 6889, 7155, 7952 (Erie); 3002-03, 6874-75, 7453-55, 7463, 7464-67 (Lorain); 6798-99, 6904 (Huron): 3424-27, 3430-31, 7024-25, 7057-59 (Whiskey Island); 3506-07 (Toledo); 8379, 8416-17, 8418, 8419, 8420; 3011-13 (Penn Central Docks, Huron, Conneaut, Lorain, Fairport, A&B Dock). One conspirator boasted that "[w]e have strongly resisted for years all proposals to sell or lease the Erie Ore Dock." *Id.* at 7952. Similarly, the conspirators blocked attempts to lease property for a self-unloader dock because "[i]f such a facility

is not established the [self-unloader] boats will not be attractive." *Id.* at 6875.

- Boycotts of non-railroad docks to prevent the handling of iron ore by unregulated entities the railroads could not control. Pet. App. 19a, 31a; CA App. 6469, 6527, 6535, 6579, 6596, 6876, 6894-95, 6898-99, 7546, 8260, 8391, 8393, 8394-96, 8419, 8420.

- Agreements not to act independently, and coercion and threats of retaliation against any co-conspirator that proposed independent action. Pet. App. 19a, 31a; CA App. 6527-28, 6579, 6631, 6637-38, 6640-41, 6643, 6890, 6894, 6897, 6950.

- Interference with efforts to transport iron ore by truck from non-railroad docks, eliminating the only cost-effective alternative to rail transportation. Pet. App. 19a, 31a, 57A; CA App. 3374, 7445, 7458, 7483, 7746, 7952.

- Refusals to allow self-unloaders to dock at railroad-owned facilities. Pet. App. 34a; CA App. 6495, 6883, 7311, 7317-18, 7391-92. B&LE specifically thought it "the better part of wisdom to discourage the self-unloader . . . ." *Id.* at 7317.

- Deliberately conducting the conspiracy in secrecy and acting outside ICC regulations and procedures. Pet. App. 95a-97a; CA App. 1273, 6457-59, 6460-63, 6483-84, 6495, 6631, 6640, 6890-91, 7154, 7312, 8242.

One episode epitomizes the depth, scope and effectiveness of the railroad conspiracy, and establishes that it was not the "rate" conspiracy petitioner suggests. In 1971, after successfully forestalling self-unloaders for 15 years, the conspirators were besieged by requests from steel companies to accommodate self-unloaders and non-railroad docks. *See* CA App. 7438. The "problem was all these [steel companies] wanted something better . . . . Everybody that had or thought he might have or could get the use of a self-

unloader was looking for less expensive transfer charges . . . ." *Id.* at 2860. At the same time, conspirator Chessie's outmoded dock equipment for handling bulker vessels was losing money. *Id.* at 7463. To serve its own business interest, Chessie negotiated to lease its dock facilities to non-railroad interests and "encourage use of self-unloaders." Bound by the conspiracy, however, Chessie was not permitted to act independently. *Id.* at 7441-42, 7456-59, 7460-62, 7465-67.

The conspirators' "negative reaction" to Chessie's plan was "immediate and vocal." CA App. 7454. They threatened "rate wars" on eastern coal routes (an entirely different commodity and a major revenue source for Chessie) (*id.* at 7444), warned that such leases could enable trucks to "break the rail rate on iron ore" (*id.* at 7458), and told Chessie that "concessions" to self-unloaders or to the steel companies could be avoided if "all lines hang together" (*id.* at 7436). *See also id.* at 7435-36, 7441-42, 7453-55, 7456-58.

The President and CEO of conspirator Penn Central wrote to his counterpart at Chessie concerning the "inherent dangers of including a separate commercial interest" in the iron ore transportation system, and objecting to "the intrusion of another principal who would perform an integral part of the transportation cycle on whatever selective commercial and product considerations he may choose." CA App. 7461. The threat to retaliate worked; Chessie did not lease its property. *Id.* at 7447, 7493-95, 7464, 7467.

3. It is preposterous for petitioner to argue that "there is no evidence" linking it to this conspiracy. Pet. 14 n. 9. B&LE was a leading figure in the conspiracy and a major transporter of iron ore. A wholly-owned subsidiary of U.S. Steel, B&LE had a special interest in preventing the use of self-unloaders by its parent's competitors. Because U.S. Steel was the last steel company to pelletize its ore and the last to have ore suitable for shipment by self-unloader, it was in U.S. Steel's economic interest to deprive its

competitors of a significant transportation cost savings while boosting the revenues of its B&LE subsidiary. CA App. 4100-01, 4317, 4324-27.

Consistent with this dual economic incentive, B&LE was an active member of the conspiracy. Pet. App. 19a. B&LE representatives attended and participated in the first and every significant conspiratorial meeting. CA App. 6457, 6483, 6897. Among B&LE's many overt acts in furtherance of the conspiracy were:

- *1956:* B&LE participated in the June 7, 1956 meeting at which the railroads reached their secret oral agreement to block the use of self-unloader technology to transport iron ore. CA App. 6457, 6460-63, 6532-34. B&LE and others agreed to eliminate existing service from private docks such as Columbus Road, National Terminal and Sycamore Slip. *Id.* at 6469. B&LE agreed with its co-conspirators to enact restrictive lease provisions to preclude competitors from operating private iron ore docks in competition with the railroads. *Id.* at 6454-56, 6478, 6485-86.

- *1961*: B&LE chaired a special study committee to investigate and ultimately block another railroad's proposal to handle self-unloaders. CA App. 6631, 6640-44.

- *1968*: When the conspirators learned that one railroad was planning to handle self-unloaders, B&LE instigated the collective response that squelched that threat to the conspiracy. CA App. 6883, 6887.

- *1971*: B&LE actively participated in the meeting at which the conspirators forced another railroad not to lease lakeside land for use by self-unloaders. CA App. 7435-36, 7453-55, 7456-59.

- *1976*: B&LE convened a meeting to discuss ways to combat competition from trucks. CA App. 7907-08. B&LE chaired a "Special Committee" to monitor truck competition; the committee held meetings in B&LE's offices,

and its final report was discussed at another meeting in B&LE's offices. *Id.* at 7943-45, 7955-89, 7990-91.

- *1978*: B&LE coordinated the railroads' joint response to an effort to ship ore from a non-railroad dock in Ashtabula. CA App. 8394-96. After learning of the potential use of the non-railroad dock, B&LE immediately contacted other conspirators and met with Conrail officials to formulate retaliatory action that stopped all further movements of iron ore from the non-railroad dock. *Id.*

4. The conspiracy had precisely the anticompetitive results B&LE intended. As early as 1956, the conspirators recognized that unless they acted to forestall competition from the new self-unloader technology, there would be a "switch in the movement of raw ore from 100% in bulk freighters . . . to substantial self-unloader movements." CA App. 6460. By 1967, the conspirators anticipated that, unless they acted, "10 of these large [self-unloader] vessels [will] be built in . . . the next 5-10 years." *Id.* at 6817. The conspirators' documents repeatedly confirm that, absent the conspiracy, there would have been a "proliferation" of non-railroad docks "springing up" all along the lake, which customers would have "preferred" over railroad docks. *Id.* at 2459-60, 6596. *See, e.g., id.* at 2464-65, 2470, 6460, 6528, 6575, 6890-91, 6900-01, 7460-63.

The steel companies were keenly interested in using the lower-cost alternative system to transport their iron ore. *See, e.g.*, CA App. 2961, 2954 (**Wheeling-Pitt**); *id.* at 2993, 3010-12, 3039, 3667-68, 3044, 4205 (**Republic**); *id.* at 2754, 2757-58, 2796-98, 2800-03, 2845, 4604, 4662, 7421-22, 7394 -7405 (**J&L**); *id.* at 3250-54, 3258-67, 3322, 7147-48, 8521 (**National**); *id.* at 3134-37, 3169-70, 3177-78, 3186-87, 3192, 3382-83, 7948 (**Sharon**). But, the conspiracy prevented steel company use of the new technology until the late 1970s and early 1980s. Full utilization of the alternative iron ore transportation system did not occur until after the conspirators were indicted in 1981. *Id.* at 2763, 2954-2956. Once allowed to compete, the new technology's efficiencies quickly made it

the prevailing mode of iron ore transportation. *Id.* at 2754, 2797-98, 2802-03, 2953-55, 3044. Today, virtually all iron ore is handled by self-unloaders.

District Court Proceedings

Pretrial Proceedings. The present consolidated civil cases were filed by respondents in various district courts from 1982 to 1984 . On April 17, 1984, the Judicial Panel on Multidistrict Litigation consolidated the ten cases and assigned them for pretrial proceedings before then Chief Judge John P. Fullam in the Eastern District of Pennsylvania. Pet. App. 20a. In pretrial rulings, the district court dismissed "[a]ll rate-related claims asserted by the steel company plaintiffs" based on the allegation in the initial complaints that, absent the conspiracy, these plaintiffs would have paid lower railroad rates. App., *infra* 46A. Such damage claims, the court held, were barred by *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). *See* Pet. App. 21a. Accordingly, as both the district court and the court of appeals stated, these claims were not presented at trial and were not part of the damages awarded in the judgments affirmed by the Third Circuit. *Id.* at 96a, 29a-30a.

Prior to trial, the district court also ruled that steel company plaintiffs had standing to claim damages for injuries suffered as a result of the conspiracy. App., *infra* 38A-40A, 46A; *see* Pet. App. 21a-22a. The court held that the steel companies were directly affected by the railroads' exclusion of competing modes of transportation and handling services, and that the steel companies "claim to suffer one of the greatest antitrust harms, an inability to seek lower prices from competitors destroyed or delayed by an illegal conspiracy." App., *infra* 38A.

The Liability Trial. The liability phase of the consolidated trial lasted more than six weeks. Pet. App. 22a. The jury was comprehensively instructed on the "limited" application of the antitrust laws in the "heavily regulated [railroad] industry," including instructions on antitrust

immunity and the "concomitant principle" of *Keogh*. CA App. 4971, 4981. The jury charge explained regulated ratemaking and expressly instructed that "none of that kind of agreement or collusive activity would be a violation of the antitrust laws" and that "nobody can make a claim for damages measured by or based upon the fact that they paid a rate authorized by an ICC-approved tariff by claiming that that rate was too high." *Id.* at 4978, 5029-30. The jury was given a set of 20 special interrogatories including, over plaintiffs' objections, two questions proposed by B&LE allowing the jury to find B&LE not liable because of the regulatory environment: (1) Was "each act in furtherance of the . . . conspiracy . . . taken in a good faith belief that it was required by ICC regulations?" (2) Was B&LE's "conduct reasonable . . . under the regulatory policies under which defendant operated?" App., *infra* 62A.

The liability jury returned verdicts in favor of all but one plaintiff (Reaney). Pet. App. 22a. In answering the special interrogatories, the jury accepted some claims of the successful plaintiffs and rejected others. The jury found that B&LE participated in a conspiracy to monopolize and to restrain trade in violation of the Ohio Valentine Act and the Sherman Act; that acts in furtherance of the conspiracy occurred within the federal statute of limitations period; that B&LE did not withdraw from the conspiracy; that the conspirators affirmatively acted to conceal the conspiracy; and that the conspiracy in which B&LE participated was a material cause of injury to each successful plaintiff.[6] The jury also expressly rejected B&LE's "good faith" and "regulatory climate" defenses, answering "no" to the two questions included at B&LE's insistence. App., *infra* 62A.

The Damages Trial. During the damages trial before a new jury, plaintiffs again demonstrated that, absent the

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6 With respect to each steel company plaintiff, the jury found that antitrust injury resulted from "foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore" and "inability to fully use private docks to handle iron ore." App., *infra* 50A-54A

conspiracy, lower-cost self-unloaders and non-railroad docks would have developed earlier. To measure damages suffered by this delay, plaintiffs used contemporaneous financial and cost records of actual competitors, among other evidence, and estimated the costs that would have existed earlier. CA App. 5259-69, 5429-44, 5450-51, 5454-73, 10351. Steel company damages were measured by the difference between the costs they would have incurred by utilizing excluded *unregulated* competitors and the higher prices plaintiffs actually paid, shipment by shipment, ton by ton, during the relevant period. Pet. App. 23a; CA App. 5251, 5456-69, 10565, 10628, 10690, 10335-47, 10327. Dock and trucking company damages were measured by the profits each would have earned on the business from which they had been excluded. Pet. App. 23a. Plaintiffs' damage models avoided any overlap or duplication, and the jury was instructed that overlapping damages were prohibited. CA App. 6394-98.

Just as the liability jury had done, the damages jury accepted some of plaintiffs' claims and rejected others in whole or in part. The jury awarded only a portion of the damages sought by Republic, J&L and Wheeling-Pitt; rejected whole categories of damages sought by National, Sharon, Erie, Ambrosia and Tauro; and awarded only nominal damages to Wills. App., *infra* 48A-71A. Of the single damages awarded to all plaintiffs, more than 40% was awarded under Ohio's Valentine Act for a period in which no claim was made under federal law.

Post-Trial Proceedings. The district court denied substantially all of B&LE's motion for judgment notwithstanding the verdict. Pet. App. 24a-25a. The jury verdicts were reduced by $180.8 million to reflect settlements by other defendants, and judgments were entered aggregating $457.7 million. Pet. App. 24a-25a, 91a-121a. B&LE's former parent company, USX Corporation, executed a supersedeas bond to secure the judgments on appeal. CA App. 14.

Court Of Appeals Proceedings

A unanimous panel of the United States Court of Appeals for the Third Circuit affirmed the district court judgments in all respects material to the petition, with special praise for the district court's careful "shepherding [of] the parties and issues through the complexities of the lawsuit." Pet. App. 88a. Noting the pretrial dismissal of "*Keogh*" claims, the Third Circuit concluded that the claims that went to trial were based on forceful evidence of "the railroads' agreements to restrict the sale and lease of dock property, boycotts of unregulated docks, refusals to handle self-unloaders in a way that would make economic sense for a steel company to utilize them, and coercion to prevent independent action." *Id.* at 31a. The court of appeals found that B&LE engaged in "market preclusion," and that "the steel company plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims." *Id.* at 31a, 34a. Moreover, the Third Circuit observed that the jury was correctly instructed that rate-related conduct within the meaning of *Keogh* could not give rise to liability. *Id.* at 35a. The court explained that neither the injury nor the measure of damages implicated the "filed rate" concerns of *Keogh* (*id.* at 32a):

> It is fully consistent with *Keogh* . . . to accept these [railroad] rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market. The instrument of damage to the steel companies was the absence of the lower cost combination.

The court of appeals rejected B&LE's additional argument that *Keogh* should also be extended to bar claims by competitors, such as the dock and trucking companies. Adhering to its longstanding precedent and to consistent holdings of the Second, Eighth and Ninth Circuits, the court

held that *Keogh* posed no bar to claims by competitors because "'[t]here is no policy conflict, actual or potential . . . between the section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.'" Pet. App. 36a (quoting *Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1122 (3d Cir. 1979)).

In assessing antitrust standing, the Third Circuit applied the factors this Court enumerated in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), with respect to each successful claim. The court rejected B&LE's contention that Republic, J&L and Wheeling-Pitt lacked standing to recover their self-unloader damages (the savings they would have realized from utilizing the unregulated, lower-cost vessels that performed unloading services in competition with the railroad docks) because "it was unquestionably the steel companies who bore the brunt of the increased costs" caused by the antitrust violation. Pet. App. 51a.[7] The court explained the directness of this injury: "steel companies were the sole customers of the industry involved in the transhipment of ore; indeed the industry existed for them." *Id.* As the trial record established, "the steel companies suffered the greatest harm in connection with the delay in the use of the self-unloader technology," and the unmistakable directness of this harm weighed heavily in favor of the steel companies' standing. *Id.*

The court also held that steel company plaintiffs had standing to recover as dock-handling damages the difference between the amounts plaintiffs actually paid for dock-handling services and the lower costs of using alternative, unregulated docks. Again, the railroads' conspiracy unlawfully deprived steel companies of savings from the use of lower-cost, unregulated competitors that

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[7] B&LE did not challenge National's standing to recover damages related to National's ownership and operation of its own fleet of vessels. The Third Circuit noted that B&LE's arguments were inapplicable to National. Pet. App. 42a n. 11.

were an integral part of the alternative transportation system. Pet. App. 54a-55a.

ARGUMENT

The unanimous opinion of the Third Circuit fully considered and correctly applied well-settled legal standards to the lengthy, fact-intensive record in this case. The judgment below does not conflict with decisions of this Court or of any other court of appeals. This Court should decline petitioner's invitation to reweigh the facts found by two separate juries, upheld by the district court, and affirmed by the Third Circuit.

Three additional factors in this case strongly counsel against further review. **First**, petitioner's arguments are premised on glaring mischaracterizations of the record. Petitioner asks this Court to decide whether *Keogh* bars a claim "where tariff rates are the primary . . . means of precluding market entry" (Pet. i), but that is simply not this case. Contrary to petitioner's contention that this is *principally* a "rate" case challenging a price-fixing conspiracy of the sort alleged in *Keogh*, the jury found, with proper instructions and abundant evidentiary support, that B&LE participated in a conspiracy to exclude competition, implemented through activity that was not "rate-related" within the meaning of *Keogh*. The court of appeals affirmed, expressly reciting the non-rate conduct that directly injured plaintiffs and only "coincidentally implicate[d] rates." Pet. App. 32a. Petitioner's effort to transform such ancillary conduct into a cloak of protection for its ruthlessly predatory non-rate conduct is light years removed from the record, and merely seeks to relitigate in this Court fact issues on which the jury and both lower courts agreed. It is fatal to petitioner's request for review of "*Keogh*" issues that the district court dismissed all such claims prior to trial; accordingly, "rate-related" claims of the sort in *Keogh* and similar cases played no role in the judgments.

Similar distortions and omissions infect petitioner's request for review of the Third Circuit's recognition that no claims in this case are barred by *Illinois Brick*. Petitioner's argument is premised on the erroneous view that the Third Circuit upheld the judgments in favor of the steel companies "without regard to whether they have suffered antitrust injury." Pet. 27. The Third Circuit actually concluded that: (1) "B&LE's antitrust activity directly impacted the steel companies;" (2) "it was unquestionably the steel companies who bore the brunt of the increased costs attributed to the railroads' agreement to thwart development of the less expensive technology;" and (3) the steel companies' alleged injury "was the type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." Pet. App. 51a, 52a. The liability jury similarly found that the conspiracy was "a material cause of any injury to the business or property" of each steel company plaintiff. App., *infra* 50A-54A. In short, this case does not present the questions that petitioner poses for review, and this Court should be especially wary of petitioner's invitation to decide such issues on the record of this case.

Second, the major statutory revisions of the regulatory scheme that occurred after the events at issue weigh decisively against certiorari here. The Staggers Rail Act of 1980 so transformed the regulatory landscape and the roles of the ICC and of railroad rate bureaus that B&LE advised this Court more than five years ago in a case arising from the same conspiracy that rate bureaus no longer exist and that issues of the sort raised in the petition are a "dead letter" and "virtually inconceivable" to arise "ever again." Br. in Opp., *Pinney Dock & Transport Co. v. Norfolk & Western Railway Co.*, No. 88-72 (Aug. 10, 1988), at 3, 6, 12. The likelihood of recurrence is even more remote today, making this case a singularly unsuitable vehicle for review.

Third, the unique factual setting and procedural posture of this case also caution against review: a successful conspiracy that forestalled development of a new and unregulated technological system for more than a

generation; conduct occurring some 15-35 years ago in a largely superseded regulatory climate; jury verdicts supported by abundant evidence pursuant to instructions petitioner does not challenge; and judgments anchored in substantial part in state law violations that the petition also does not challenge (and this Court would have no province to review). Review is all the more inappropriate because – without informing this Court – B&LE now retreats from and attacks positions it previously championed; and it relies on unpublished, nonprecedential authority (without so identifying it).

In sum, the petition is not rooted in this case, but in B&LE's flawed, after-the-fact reconstruction of the proceedings below. Petitioner may well have reason to re-think the litigation strategy it pursued in the lower courts, but it cannot re-write the extensive record of those proceedings. Certiorari should be denied.

I. PRIVATE TREBLE-DAMAGE ACTIONS FOR UNLAWFUL, NON-RATE ACTIVITY THAT EXCLUDES COMPETITION ARE CONSISTENT WITH DECISIONS OF THIS AND OTHER COURTS

The decision below does not hold that a conspiracy in which filed rates are the "primary," "dominant," or "core" component is subject to a private antitrust damage action. Pet. i, 9, 14. Nor, as the petition contends, did the Third Circuit "refuse[] to apply" precedents. Pet. 12. Rather, the decision below embodies a straightforward application of the holding in *Keogh*, reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), *viz.*, that a shipper cannot recover damages on the ground that regulated carriers fixed the rates it paid.

The Third Circuit correctly perceived that the claims in this case do not rest on a theory of price-fixing as they did in *Keogh*. All *Keogh* claims were dismissed by the district court

long before trial.[8] Based on those rulings, the claims that actually went to trial and are reflected in the judgments reviewed by the court of appeals are not within the rationale of *Keogh* and *Square D*.

Plaintiffs here proved a railroad conspiracy to preclude competition from an alternative, unregulated system of transporting iron ore. Pet. App. 32a. The excluded dock and truck competitors established as damages their lost profits. The steel companies proved that they were denied the benefits of a competing, lower-cost iron ore transportation system that was delayed by the conspiracy. *Id.* at 33a. The steel companies did not seek any damages for overcharges on railroad handling or rail transportation of their ore, which would be barred by *Keogh*; their dock-handling damages were the difference between amounts actually paid for dock-handling services and the lesser amounts that would have been paid to unregulated non-railroad docks if they had not been excluded by the conspiracy; and their self-unloader damages were the difference between the actual cost of bulker/railroad dock

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8 In Pretrial Order No. 4, the district court dismissed all claims in the original complaints "based on rates charged the plaintiffs by defendant railroads" and permitted amended pleadings if plaintiffs could separate rate-related claims from non-rate claims and could "show that carriers caused injury to the shipper's business or property other than by higher tariffs." App., *infra* 10A, 13A. (The defendant carriers in *Square D* cited this order as a correct application of *Keogh*, and appended the order to their brief in this Court. Br. in Opp., *Square D*, No. 85-21 (Aug. 2, 1985), at 2a; Resp. Br., *Square D*, No. 85-21 (Jan. 3, 1986), at 10). Pretrial Order No. 11 scrutinized the amended complaints from the perspective of *Keogh* and dismissed all rate-related claims involving hypothetical filed tariffs. At the same time, the court upheld claims based on illegal activities other than price fixing and claims for injuries "caused by actions outside the ICC's exclusive jurisdiction." App., *infra* 37A. Pretrial Order No. 49 reiterated that *Keogh* precluded rate-related claims by shippers and dismissed "[a]ll rate-related claims asserted by the steel company plaintiffs including claims that, but for the alleged conspiracy, these plaintiffs could have obtained lower land-transportation costs." *Id.* at 46A.

At trial, B&LE did not object to evidence it now denounces as "rate-related." Indeed, B&LE itself introduced evidence of rates as part of its defense that the conspiracy involved only immune ratemaking. *See, e.g.*, CA App. 4075-76, 4099-4101, 4806-07.

shipments and the lower cost of using unregulated self-unloaders excluded by the conspiracy.

All plaintiffs' damage calculations accepted the lawfulness of all filed tariffs, and did not assume any change in railroad rates. Hypothetical railroad rates played no role in this case whatsoever. Based on its extensive review of the trial record, and taking into account the district court's pretrial rulings and jury instructions (which the petition ignores), the Third Circuit correctly recognized that the claims actually tried in this case are dispositively distinct from those addressed in *Keogh* and *Square D.* Pet. App. 31a-33a.

Keogh was a price-fixing case where plaintiff complained that filed rates violated the antitrust laws because they were jointly agreed upon; plaintiff sought damages based on the difference between those filed rates and hypothetical, lower filed rates. The decision below correctly observed that, in contrast, here "[t]he instrument of damage to the steel companies was the absence of the low-cost combination [of self-unloaders/private docks]." Pet. App. 32a. The Third Circuit is thus in full accord with the conclusion reached by the District of Columbia Circuit in affirming petitioner's antitrust conviction in the related criminal case, *viz.*, that the conspiracy here "only incidentally touched upon the setting of rates; its real purpose was to ward off outside competition heralded by the advent of the self-unloaders." 717 F.2d at 601. The Third Circuit repeatedly identified non-rate activity in support of its ruling, "particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors," and the court recognized that rate-related conduct was merely "coincidental[]" or "ancillary." Pet. App. at 32a, 33a. Nonetheless, petitioner invites the Court to reexamine the testimony of more than 40 trial witnesses and thousands of trial exhibits for vestiges of claims "primarily" based on rates, precisely the claims the district court dismissed prior to trial.

Petitioner's acknowledgment to this Court that the claims include non-rate-related conduct is a tactical retreat from its argument in the lower courts that **all** conduct in this case is rate-related. At trial, B&LE presented expert testimony that even the conspiracy's restrictions on the sale or lease of property were rate-related. Liab. Tr. 4105-06. According to B&LE, **anything** the railroads did to preserve their monopoly was rate-related. Similarly, in the court of appeals, B&LE repeatedly argued that "the judgments below were based **solely** on rate-related conduct." B&LE 3d Cir. Reply Br. 2 (emphasis added). *See also id.* at 18 ("Once Plaintiffs' Rate-Related Claims are Excluded, Nothing Remains Of Plaintiffs' Antitrust Claims, And The Case Should Be Dismissed"); B&LE 3d Cir. Br. 34 (same).[9] Having failed in the courts below with these extreme contentions, B&LE's certiorari-inspired conversion does not warrant this Court's consideration.

Square D provides an additional reason why this Court should decline petitioner's invitation to expand *Keogh*. In *Square D*, this Court reaffirmed *Keogh* on the narrow ground of *stare decisis* and because Congress had chosen not to alter *Keogh*. Neither of these factors justifies an expansion of *Keogh* to create new law that Congress has not addressed and that is not justified by precedent.

As petitioner concedes, *Square D* held that *Keogh* requires dismissal only of certain claims for injury caused by rate-setting conduct. *See* Pet 12. In *Square D*, this Court and the

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9 B&LE's aggressive arguments in the lower courts put the lie to its representation to this Court that "Petitioner has never contended that respondents are prevented from attempting to prove that non-rate-related activities by the railroads injured them." Pet. 14 n. 9. B&LE consistently pressed the view below that railroads are effectively exempt from the antitrust laws. In its opening statement at trial, B&LE argued that "in any other industry," the conspirators "would be guilty of per se violations of the antitrust laws [a]nd judges like Judge Fullam would be sending them away for a little vacation in places like Lewisburg." CA App. 2434. In the criminal case, the D.C. Circuit recognized that under B&LE's view, "any joint decision to freeze the level of services or to forego development of modern services would be an agreement as to 'rates.'" 717 F.2d at 601. It correctly rejected B&LE's argument, as did the Third Circuit.

Second Circuit permitted plaintiffs "to amend their complaints to state possible claims for damages not arising from the filed tariffs." 476 U.S. at 414.[10] That is precisely the course followed below by the district court and affirmed by the court of appeals. App., *infra* 18A, 25A; Pet. App. 29a-31a.

Similarly, in *Pinney Dock & Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), the Sixth Circuit held that *Keogh* precluded damages for rate-related conduct, but did not foreclose damages for unlawful non-rate conduct. As is clear on the face of the Sixth Circuit opinion, and as petitioner concedes, *Pinney* remanded to enable plaintiffs "to pursue non-rate related claims." Pet. 15, *see* 838 F.2d at 1457.[11] Far from triggering a conflict, the decision below expressly harmonized its holding with that of the Sixth Circuit, explaining that the full trial record here provides "definite evidence of the railroads' refusal to handle self-unloaders at their docks, restrictions on the sale and lease of dock property to unregulated entities, boycotts of unregulated docks and intra-industry coercion claims which mirror those deemed by the court of appeals in *Pinney* to escape *Keogh*." Pet. App. 34a. *See* 838 F.2d at 1457 (non-rate claims, such as restrictions on sale and lease of property, boycott of non-railroad docks, and coercion to prevent independent action fall "outside of the scope of the *Keogh* doctrine" and are "plainly not related to filed rates").[12]

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[10] Such non-rate claims were then asserted against the regulated carriers in *Square D*, and the litigation was later settled.

[11] Plaintiffs in *Pinney* amended their complaints to pursue non-*Keogh* claims which were settled by all defendants, including B&LE.

[12] The Third Circuit clearly explained why its opinion does not conflict with the Sixth Circuit's decision in *Pinney*. Even if there were any merit to petitioner's contention that the cases reached "disparate results" (Pet. 15), the very different records in the two cases preclude any true conflict.

One critical difference between this case and *Pinney*, which petitioner fails to bring to this Court's attention, is that plaintiffs in *Pinney* expressly waived all claims that the railroads failed to comply with their ICC-approved rate bureau agreement. 838 F.2d at 1460. Thus, the conspirators enjoyed the full extent of antitrust immunity under the

This Court denied certiorari in *Pinney* and there are compelling reasons for the same disposition here. As B&LE emphasized in opposing certiorari in *Pinney*, extensive changes in the statutory framework applicable to rail transportation reduce the regulatory-based issues to anachronisms with virtually no remaining jurisprudential significance. The Staggers Rail Act of 1980 transformed the operation of both the ICC and railroad rate bureaus. Pub.L. No. 96-448, 94 Stat. 1895 (codified as amended in 49 U.S.C. §§ 10101a *et seq.*). In B&LE's words, "the railroads' rate bureau ceased operations many years ago," making the scope of regulatory protection, or exemption, from antitrust remedies a "dead letter," "largely beside the point," and "virtually inconceivable ... to ... arise ever again." *Pinney*, Br. in Opp. at 3, 12. Changes imposed by the Staggers Act of 1980 include: circumscribing the immunity and rate-setting functions of bureaus (49 U.S.C. § 10706); substantially removing the ICC from rate-setting (*id.* at § 10701a); and exempting railroads from tariff filing and reasonableness determinations when a shipper contract is filed with the ICC (*id.* at § 10713). *See* Pet. App. 16a n. 2, 28a n. 3.

Five years after this Court denied review in *Pinney*, and thirteen years after the Staggers Act launched a regime of deregulation, there is even less reason to examine the role of *Keogh* on pre-Staggers Act conduct. As petitioner notes, in *Square D* this Court viewed *Keogh* as "an established

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Interstate Commerce Act, irrespective of *Keogh*. In this case, respondents did not waive such claims and the conspirators enjoyed no blanket statutory immunity. That issue was reserved for trial and respondents proved by overwhelming evidence that the railroads repeatedly violated procedural requirements. Indeed, the liability jury expressly rejected petitioner's regulatory framework and "good faith" defenses in response to special interrogatories. App., *infra* 62A.

Another key factual distinction is that *Pinney*, which arose in the context of interlocutory appeal under 28 U.S.C. § 1292(b) from the denial of motions for summary judgment, reached the court of appeals with both rate-related and non-rate-related claims remaining in the case. In contrast, the Third Circuit decision arose after all *Keogh* claims had been dismissed and following a full trial, which permitted the court of appeals to assess the evidentiary basis for the claims actually presented to the jury.

guidepost at the intersection of the antitrust and interstate commerce statutory regimes." Pet. 12 (quoting 476 U.S. at 423). The conduct in this case arose before the regulatory road map was materially redrawn; the "intersection" existing then has been closed. Even if the questions addressed in the petition were actually presented in this case, and even if those questions – in the abstract – merited review, the dated context of this case would severely limit any decision by this Court.

Nor will this case serve as a precedent for the application of *Keogh* to other industries, as petitioner contends. Pet. 18-19. The distinctive regulatory regimes in other industries present factual and legal differences that make this railroad transportation case an inadequate, and dangerous, vehicle to settle the application of *Keogh* in other, dissimilar contexts. Even in other regulatory contexts, the Court has recognized that not all invocations of the filed-rate doctrine merit review. *See, e.g.* the recent denials of certiorari in *United States Metroline Services, Inc. v. Southwestern Bell Telephone Co.*, No. 93-99, *cert. denied*, Oct. 4, 1993 (114 S. Ct. 183); *Ticor Title Insurance Co. v. Brown*, No. 92-1988, *cert. granted on other issue and denied on filed-rate issue*, Oct. 14, 1993 (114 S. Ct. 56).

II. THE QUESTION WHETHER *KEOGH* BARS CLAIMS BY COMPETITORS DOES NOT WARRANT REVIEW

For the same reasons that this case does not implicate the concerns of *Keogh*, it does not provide an opportunity for this Court to decide the subordinate question – relating only to some respondents – whether *Keogh* should be extended even further to bar claims by competitors.[13] It is also directly contrary to this Court's rationale in *Square D* for the

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[13] This aspect of the petition does not relate to claims by Republic, J&L, Wheeling-Pitt and Sharon, but only to claims by the dock and trucking companies and National. Both courts below held that *Keogh* has no application to National because it owned vessels for transporting and unloading iron ore and was a competitor of the railroad docks, not a customer. Pet. App. 29a n. 4, 101a.

seventy-year precedent of *Keogh* suddenly to be expanded. In any event, the Court denied review on this question in *Pinney* and should do so again.

The decision below broke no new ground; it merely applied longstanding precedents of the Second, Third, Eighth and Ninth Circuits. Pet. App. 36a. The Third Circuit also explained that in *Keogh, Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), and *Square D*, this Court did not address competitor claims, but rather claims by shippers that their rates were "higher than [in] a freely competitive market," that they would have been "charged a lower rate absent the conspiracy," and that they were entitled to "treble damages measured by that difference." Pet. App. 33a, 36a-37a n. 6. In those cases, private damage actions were barred for customers alleging that joint ratemaking activities had reduced competition among the defendant carriers, causing plaintiffs to pay rates set at a supracompetitive level. In contrast, the present case involves a conspiracy to exclude an alternative mode of transportation. Claims asserted by such excluded competitors do not conflict with the regulatory framework. And, as Judge Friendly's opinion in *Square D* recognized, in "suits by competitors rather than users of the service . . . many of the considerations relied upon in *Keogh* would not apply." 760 F.2d 1347, 1356 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986). In affirming *Square D* on other grounds, this Court carefully limited its language to claims by shippers (not competitors). After seventy years of applying *Keogh* to customer claims challenging rates, there is no justification for expanding *Keogh* to bar competitors' claims arising from market exclusion.[14]

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14 There is no merit to petitioner's reliance (Pet. 11, 16, 18) on *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp.*, 998 F.2d 1009 (4th Cir. 1993) (Table), pet. for cert. filed, No. 93-456 (Oct. 4, 1993). Petitioner's citation hides from this Court the fact that the Fourth Circuit's summary disposition in *Lifschultz* is an unpublished opinion with no precedential value. *See* Fourth Cir. Internal Oper. Proc. 36.6. On its face, the slip opinion states: "Unpublished opinions are not binding precedent in this circuit. *See I.O.P.* 36.5 and 36.6." Dkt. No. 92-2523 (4th Cir. July 6, 1993), slip op. 2. In any event, the Fourth Circuit's affirmance of the multiple and alternative grounds for granting summary judgment in *Lifschultz*

III. PETITIONER'S EFFORT TO EXPAND *ILLINOIS BRICK* DOES NOT MERIT REVIEW

The Third Circuit rejected B&LE's argument that the claims of Republic, J&L and Wheeling-Pitt are barred by *Illinois Brick* and its decision does not conflict with the decisions of this Court or any court of appeals.[15] The court's holding that these respondents have standing involves no new rule of general application; it is, rather, an unremarkable "exercise of judgment in deciding whether the law affords a remedy in [these] specific circumstances." *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537 (1983) ("*AGC*"). Faithfully adhering to the principles and factors this Court has enumerated, the court below reached precisely the same conclusion that the Sixth Circuit reached in *Pinney*, at B&LE's urging, namely, that "[t]he steel companies . . . were the immediate victims" of the railroads' unlawful conspiracy to exclude alternative modes of transporting iron ore. 838 F.2d at 1462.[16]

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does not address or consider the Third Circuit's detailed opinion in this case, which had been issued more than one month earlier.

[15] The petition does not raise *Illinois Brick* or standing issues with respect to the dock and trucking company plaintiffs or National. Although the petition refers to "steel companies" without noting the factual differences in the steel companies' claims, its argument is directed to Republic, Wheeling-Pitt, J&L. B&LE did not raise an *Illinois Brick* argument against National in the court of appeals and is therefore barred from doing so in this Court. Even under B&LE's incorrect, overly-broad view of *Illinois Brick*, that case has no application to National, which owned its own fleet and was not a purchaser of the handling services performed by self-unloaders. Both courts below noted this unique aspect of National's claims. Pet. App. 42a n. 11; App., *infra* 33A-35A.

[16] In its briefs in *Pinney*, which B&LE acknowledges involved the same conspiracy considered in this case (Pet. 2), B&LE stated that the steel companies were directly injured parties. Brief of Defendant-Appellees/Appellants in *Pinney* at 35, 40, 42. Having successfully urged the Sixth Circuit to rule that the steel companies clearly have standing to recover for injuries caused by the conspiracy, B&LE is scarcely in a position to complain about an imagined "conflict." The fact is that both courts of appeals that considered the question held that the steel companies are direct victims, suffered antitrust injury, and have standing.

Petitioner thoroughly misunderstands *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Contrary to petitioner's contention, that case affirmatively supports the steel companies' federal antitrust claims here.[17]

Defendants in *Illinois Brick* conspired to fix the price of concrete blocks sold to masonry contractors; the masonry contractors sold the blocks to general contractors who used the blocks to construct buildings. Plaintiffs in *Illinois Brick* purchased those buildings from the general contractors and sued the block manufacturers to recover the illegal overcharge. This Court dismissed the claims of the remote purchasers for three reasons: (1) the risk of duplicative recoveries if all persons in the vertical chain of distribution who purchased and resold the product could sue; (2) the evidentiary complications in identifying affected parties and apportioning their damages; and (3) the difficulties of managing large, complex suits. *Id.* at 730, 738, 741, 745-47. The Court emphasized that increasing the cost of litigation and diffusing its benefits among a larger group of plaintiffs would seriously diminish the incentive to sue and thus reduce effective antitrust enforcement. *Id.* at 747.

To avoid duplicative recoveries, *Illinois Brick* restricted the class of plaintiffs to the first purchasers, the ones who were direct customers of the defendants. *Id.* at 737.[18] That is precisely the position of the steel companies in this case; they purchased dock-handling services directly from the conspirators. The steel companies are the only direct purchasers of iron ore transportation services. Indeed, the whole purpose of the conspiracy was to keep the steel

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17 The petition does not challenge respondents' claims under the Ohio Valentine Act, which its conduct was also found to violate. There is no occasion for this Court to review questions of state law that are not preempted by federal antitrust law. *Cf. California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989).

18 *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), also involved a price-fixing scheme in which a single unlawful overcharge was passed on by the initial purchaser to indirect purchasers in a vertical distribution chain.

companies as direct purchasers of the railroads and prevent them from becoming direct purchasers of new entrants with alternative means of handling iron ore (*i.e.*, self-unloaders and private docks). That is why the court below reached precisely the same conclusion that the Sixth Circuit reached in *Pinney*.

Nor are there any evidentiary complications or unusual difficulties in identifying the injured parties and apportioning their damages. The steel companies that lost the benefit of new entry and the dock and trucking companies who were excluded were all easily identified. As the Third Circuit noted, the damages suffered by the different classes of plaintiffs were analytically distinct so that apportionment did not present the difficulties of sorting out losses in a vertical distribution chain where degrees of passing on may be impossible to determine. Pet. App. 52a-53a, 89a n. 22. Not only are the damages analytically distinct, but each form of damage is of a sort familiar in antitrust litigation. The damages trial here was no more complex and arduous than it is in any large antitrust case.[19]

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[19] Petitioner's argument that every type of antitrust injury has, at most, a single type of victim, and thus a single category of plaintiffs with standing, has never been accepted by this Court or any court of appeals. The fallacy in petitioner's argument is particularly apparent in cases of market exclusion such as this, where this Court has held that standing "cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market." *Blue Shield v. McCready*, 457 U.S. 465, 483 (1982) (injury suffered by customer of excluded psychologist did not duplicate injury suffered by psychologist); *see Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1162-63 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1947 (1992) (publisher's refusal to allow consultants to place advertisements conferred antitrust standing on both competitor-consultants for lost profits and customer-advertisers for lost savings); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1365 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (defendant's conduct caused different direct injuries to football team that could not lease lower-cost stadium and to stadium that could not obtain lease revenues); *Pennsylvania Dental Ass'n v. Medical Service Ass'n*, 815 F.2d 270, 277 (3d Cir.), *cert. denied*, 484 U.S. 851 (1987) (injury suffered by subscriber to boycotted health plan did not duplicate injury suffered by health plan); *Crimpers Promotions, Inc. v. HBO*, 724 F.2d 290, 293-294 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984) (defendants' antitrust damages would have been less if they had injured only the competitor-facilitator and not the producers and stations as well); *Litton Systems, Inc. v. AT&T*,

In any event, claims of all categories of plaintiffs were tried together in this consolidated multidistrict litigation. Since the steel, dock and truck company damage models excluded overlap, and the jury was expressly instructed not to award overlapping damages (CA App. 6394-98), there is no basis in this record for any such concern. Finally, the Third Circuit also properly rejected petitioner's simplistic effort to evade responsibility for the injury it inflicted: "we do not hold that litigation must be avoided solely because it might be difficult to ascertain damages." Pet. App. 53a.

Petitioner's version of *Illinois Brick* bears no resemblance to that case. Petitioner's analysis leads, not coincidentally, to the conclusion that no injured party has standing to sue and, therefore, that B&LE should be allowed to keep every cent of its millions of dollars of illegal profits. A rule could hardly be devised that would do greater harm to antitrust enforcement.

IV. THE HOLDING THAT THE STEEL COMPANIES HAVE STANDING TO RECOVER FOR INJURIES DIRECTLY CAUSED BY THE CONSPIRACY IS IN ACCORD WITH SETTLED PRINCIPLES

Petitioner misrepresents the record by stating that the Third Circuit held that although *Illinois Brick* bars the steel companies' claims, plaintiffs may avoid that bar under a balancing of *AGC* factors. That is not the Third Circuit's holding and, therefore, the "conflict" petitioner conjures up simply does not exist. Rather, after correctly holding that *Illinois Brick* posed no bar, the decision below applied the *AGC* factors to the particular facts, just as other circuits do.[20]

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700 F.2d 785, 821-22 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (standing recognized for both customer and competitor claims).

20 *E.g., Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1571 (11th Cir. 1991), *cert. denied*, 113 S. Ct. 295 (1992); *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 960-63 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990); *Adams v. Pan American World Airways, Inc.*, 828 F.2d 24, 27-31 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988); *Southwest Suburban Board of Realtors, Inc. v. Beverly Area Planning Ass'n.*, 830 F.2d 1374, 1382 (7th Cir. 1987); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1363

Illinois Brick aside, petitioner does not challenge the Third Circuit's application of the *AGC* factors to the claims of Republic, J&L and Wheeling-Pitt.

The Third Circuit's routine application of the factors prescribed in *AGC* presents no question warranting review. In *AGC*, this Court emphasized that it is "virtually impossible to announce a black-letter rule that will dictate the result in every case" (459 U.S. at 536), and, therefore, one must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Id.* at 535.

The Third Circuit undertook precisely the analysis this Court required in *AGC*, and correctly concluded that the steel companies satisfied the applicable standards. The court of appeals observed that "[t]he steel companies were the sole customers involved in the transhipment of ore; indeed, the industry existed for them." Pet. App. 51a. Also, because the goal of antitrust laws is "to assure customers the benefits of price competition[,]" (*id.* at 52a, citations omitted), the Third Circuit correctly found that the steel companies' injuries were of the type that Congress sought to redress.[21] Finally, the Third Circuit recognized that because

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(9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987); *Walker v. U-Haul Co.*, 747 F.2d 1011, 1014 (5th Cir. 1984); *Crimpers Promotions, Inc. v. HBO, Inc.*, 724 F.2d 290, 297 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374 (8th Cir. 1983), *cert. denied*, 469 U.S. 870 (1984).

[21] An alternative ground for affirming the judgment in this case is the trial court's finding that the steel companies were competitors in the restrained market by their investment in and ownership of transportation equipment and facilities that reduced their costs, and that "but for the conspiracy, [the steel companies] would have been similarly involved with self-unloaders, and would have achieved direct cost-reductions." Pet. App. 101a. Contrary to petitioner's contention that the Third Circuit "expressly rejected" (Pet. 8) this alternative basis for liability, the court noted that the district court's rationale "might well relieve the steel companies from dismissal under *Illinois Brick*." Pet. App. 44a. Given its alternative disposition, the Third Circuit did not reach or dispose of this ground for affirmance. Thus, even if there were any merit to petitioner's attack on the stated basis for the judgment below, that would not lead to reversal of the judgment, which could be affirmed on the alternate ground upon which the district court relied. In short, the question posed

petitioner's exclusionary conduct caused two unique forms of direct antitrust injury, the steel companies' claims and the claims of the precluded competitors were not duplicative. *See* Pet. App. 52a-53a, 89a n. 22.

The decision below is also consistent with this Court's holding in *Blue Shield v. McCready*, 457 U.S. 465 (1982), that a health plan subscriber had standing to sue Blue Shield for conspiring to exclude clinical psychologists from a segment of the psychotherapy market. This Court observed that Section 4 of the Clayton Act is "comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.* at 472 (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

Consistent with this Court's teachings, the Third Circuit found that the harm to the steel companies "was clearly foreseeable," indeed, they were the intended victims. The injuries they sustained were an "integral aspect" of the conspiracy because "the steel companies suffered the greatest harm in connection with the delay of the use of the self-unloader technology." Pet. App. 51a. The injury the steel companies suffered and the injury the conspirators sought to inflict were the same – and precisely the injury the Sherman Act was enacted to prevent. *Id.* at 52a (quoting *AGC* and *McCready*). Accordingly, the decision below is in full accord with the antitrust standing principles announced by this Court.

In holding that the steel company plaintiffs have standing, the Third Circuit agreed with the Sixth Circuit's conclusion that the steel companies were immediately and directly injured victims of the railroads' conspiracy to monopolize services for transporting and handling iron ore.

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by the petition is directed only at language in the opinion below and would not affect the judgment.

The application of these settled principles to the massive evidentiary record in this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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November 23, 1993

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE
	:	NO. MDL 587
THIS DOCUMENT RELATES TO:	:	
JONES & LAUGHLIN STEEL, INC.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2135
REPUBLIC STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP.	:	NO. 84-2079
NATIONAL STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2138
SHARON STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-5562

MEMORANDUM AND PRETRIAL ORDER NO. 4

FULLAM, J. June 5, 1985

In this multidistrict litigation (MDL), 11 antitrust suits have been consolidated in this court for pretrial proceedings. Among the many motions now before the court are defendant railroads' motions to dismiss or, in the alternative, for a stay pending reference of certain issues to the ICC, filed in the actions brought by the steel company plaintiffs.[1]

The steel companies, Jones & Laughlin Steel, Inc. (Jones & Laughlin), Republic Steel Corp. (Republic), National Steel Corp. (National), Wheeling-Pittsburgh Steel Corp. (Wheeling-Pittsburgh), and Sharon Steel Corp. (Sharon), allege (as do all of the MDL plaintiffs with minor variations), that from the mid-1950s "until at least 1980" the railroad defendants (The Penn Central Corp., The Chesapeake & Ohio Railway Co., The Baltimore & Ohio Railroad Company, CSX Corporation, Bessemer and Lake Erie Railroad Co., Pittsburgh and Lake Erie Railroad Co., Consolidated Rail Corp., Norfolk & Western Railway Co., and Norfolk Southern Corp.) and other non-defendant railroads conspired to destroy competition and monopolize dock-handling, storage and land transportation of iron ore and other bulk commodities along lower Lake Erie.

Accepting as true all of plaintiffs' allegations, as I must on a motion to dismiss, the relevant facts are as follows. Much of the iron processed into steel by plaintiffs originates in mines located in Michigan, Minnesota, and Eastern Canada. The ore is shipped across the Great Lakes and unloaded at docks along lower Lake Erie in Pennsylvania and Ohio. Many of these docks were and still are owned by defendant railroads, and these docks were the primary

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[1] This Memorandum does not address Penn Central's motions to dismiss, which rest on alternative grounds. Those will be addressed in a subsequent memorandum.

handlers of iron ore. For many years, the prevailing method of unloading bulk commodities was by means of huletts, large cranes affixed to the docks. The huletts lifted the ore and other bulk commodities from the ships, known as "bulkers" or "straight deckers"; the cargo was then placed either in waiting railroad cars for immediate transportation or in a location designated for later movement to storage. During the period of the alleged conspiracy, rates for these services at all of the railroad docks were identical. The non-railroad docks in the vicinity were not equipped with huletts, and thus could not compete for iron ore traffic.

In the 1950s, some iron ore producers began to "pelletize" their ore. This innovation made possible the transport of iron ore by means of already existing self-unloading vessels. These vessels, as their name implies, were capable of unloading themselves by means of a conveyor belt. According to plaintiffs, the self-unloaders greatly lessened dock-handling time, and with the advent of "super-size" self-unloaders in the 1960s, these ships could carry twice the load carried by the conventional bulkers and could unload themselves in one-fourth the time at docks with no special handling equipment. Plaintiffs claim that the railroads, loath to lose supremacy in the iron ore trade to non-railroad docks, and fearful of losing their substantial investments in potentially useless off-loading equipment, determined to halt the progress of self-unloader technology,[2] in part by keeping dock-handling rates for self-unloaders artificially high. The railroads charged the steel companies the same dock-handling rates for the self-unloaders as they did for the bulkers, thereby diminishing the economic attractiveness of water shipment by self-unloaders.

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[2] Litton Industries, at one time a producer of self-unloading vessels, has brought suit against defendant railroads on grounds identical to those present in these cases. That case, proceeding in the Northern District of Ohio, was not consolidated for pretrial purposes with the other actions in this MDL.

A further aspect of the alleged conspiracy involves line haul rates, which are the rates charged by the railroads for transporting the ore and other commodities from specific docks to the plaintiffs' mills. Plaintiffs charge that the rates from defendant railroads' docks to all the steel mill customers were identical, notwithstanding the difference in distances. Moreover, plaintiffs charge that the private commercial or non-railroad docks[3] were effectively precluded from handling ore from the self-unloaders by defendants' refusal to publish competitive commodity line haul rates[4] from the private docks to the steel mills, and the concomitant inhibition of truck competition for land transportation.

The steel company plaintiffs charge that, by the conduct elucidated above, defendants violated §§ 1, 2 and 3 of the Sherman Act (15 U.S.C. §§ 1, 2, 3). Jones & Laughlin, Wheeling-Pittsburgh, and National also claim that this behavior gives rise to violations of the antitrust provisions of the District of Columbia Code (D.C. Code Ann. §§ 28-4501, 28-4502, 28-4503, 28-4508). All plaintiffs seek treble damages, attorneys fees, and costs pursuant to § 4 of the Clayton Act (15 U.S.C. § 15). Jones & Laughlin, Republic, and Wheeling-Pittsburgh also specifically seek injunctive relief pursuant to § 16 of the Clayton Act (15 U.S.C. § 26). (Sharon and National do not, but instead include a catchall request for other appropriate relief.)

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[3] Those docks are represented in this litigation by Erie-Western Pennsylvania Port Authority and Codan Corporation. Pinney Dock and Transport Company is also pursuing an action against the defendant railroads in the Northern District of Ohio; that action was not consolidated for pretrial purposes with the other actions in this MDL.

[4] Commodity line haul rates are, in general, cheaper than class line haul rates. Plaintiffs claim that Pittsburgh and Lake Erie Railroad Company tried to take independent action in establishing such competitive commodity line-haul rates in response to trucking competition in 1977, but was thwarted by pressure from other defendant railroads. Nevertheless, all railroads had published such competitive rates by March 1978.

I. PLAINTIFFS' CLAIMS FOR DAMAGES

Plaintiffs' damage claims are couched in terms of "denied savings," *i.e.*, they claim that the railroads' predatory behavior denied them (1) the across-the-board savings that would have resulted from swifter development of self-unloader technology; (2) the savings that would have resulted from lower dock-handling rates at private commercial docks had the self-unloader industry been more robust; (3) the savings that would have resulted from lower dock-handling rates at the railroad docks, had there been competition from private docks; (4) the savings that would have resulted from lower trucking rates, had such competition not been restrained; (5) the savings lost as a result of the railroads' artificially high line-haul rates; and (6) the savings plaintiffs would have realized had they had the option to choose the most efficient and economical combination of transportation alternatives. *See, e.g.*, Complaint of National at ¶ 28.

A. Antitrust Immunity

The defendants in the present case are members of a protected and highly regulated industry, now charged with violating the antitrust laws. For the public good, participants in such industries are permitted a measure of freedom to cooperate with each other not enjoyed by those engaged in other endeavors, on the theory that the public's interest in preventing conspiracies in restraint of trade and monopolies must be partially subordinated to the public's need for the services being rendered. But, of course, this accommodation does not totally immunize the defendants from antitrust scrutiny.

The defendant railroads' limited antitrust immunity has two sources: the statutory immunity conferred by the 1948 Reed-Bulwinkle Amendment to § 5(a) of the Interstate Commerce Act (ICA) and the opinion of the Supreme Court

in *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

Keogh was a manufacturer of excelsior and flax, who shipped his goods via defendant railroads. The railroads were members of an association through which uniform interstate rates were set. These rates had been duly filed with the Interstate Commerce Commission (ICC); moreover, the rates had been investigated by the Commission and found reasonable. Nevertheless, Keogh claimed that the rates were discriminatorily set by an unlawful conspiracy in violation of the antitrust laws.

The Court ruled otherwise; it held that the shipper could not recover treble damages "because he lost the benefit of rates still lower, which, but for the conspiracy he would have enjoyed." 260 U.S. at 162. Justice Brandeis, writing for a unanimous court, gave several reasons for this result. First, he noted that the "Act to Regulate Commerce" (the ICA) is the proper vehicle for determining the legality of a rate. Under its enforcement provision (now at 49 U.S.C. § 11705), a shipper could receive actual damages and attorneys fees. He questioned whether Congress could have "intended to provide the shipper, from whom illegal rates had been exacted, with an additional remedy under the Anti-Trust Act." *Id.* at 162.

Second, Justice Brandeis stated:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. To rule otherwise, he concluded, would allow piecemeal discrimination in favor of shippers who chose to

litigate. Finally, Justice Brandeis concluded that the damages sought were both hypothetical and speculative.

Plaintiffs here contest the application of *Keogh* to these cases, arguing that the immunity it provided was subsumed by the express immunity conferred by the Reed-Bulwinkle Act, that subsequent rulings of the Supreme Court demonstrate that *Keogh* is distinguishable on its facts from the present cases, and that its rationale is no longer compelling. For the reasons that follow, I reject plaintiffs' arguments.

The Reed-Bulwinkle Act amended the ICA to allow the railroads to enter into agreements to establish jointly rates, classes, routes, and the like, so long as these agreements are first approved by the ICC. *See* Pub. L. No. 80-662, 62 Stat. 472 (1948) (amending § 5(a) of the ICA) (current version *as amended* at 49 U.S.C. § 10706). In order to gain approval, such agreements must preserve the right of any party to act independently. *See* 49 U.S.C. § 10706(d)(2)(C). So long as the procedures set forth in the agreement for joint activity are followed, railroads are shielded from antitrust liability for that activity.[5] Under the statutory provisions in effect during the bulk of the alleged conspiracy period, any party, including the ICC, could initiate proceedings to determine whether the rates so promulgated were reasonable and/or whether they were issued pursuant to appropriate agreement procedures.[6] If the ICC concluded that the filed

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[5] The defendant railroads are parties to the Eastern Railroads Agreement. *See* 277 ICC 279 (1950). The Coal, Coke and Iron Ore Committee (CCIOC) was established by defendants to carry out the agreement by, *inter alia*, meeting publicly to discuss and propose rates. Plaintiffs charge that defendants failed to comply with the agreement procedures in setting rates, although this charge is only a corollary to plaintiffs' larger concern with the railroads' predatory behavior.

[6] Significant changes have been made in the jurisdiction of the ICC by recent legislation. *See* The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980); The Railroad Revitalization And Regulatory Reform (4R) Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976). Although the ICC's power to regulate rates has been curtailed, it still possesses the authority to ensure that rates are promulgated pursuant to approved agreements and to award damages, costs, and attorneys fees as reparation for illegal

rates were improper for any reason, it could disapprove them and, if circumstances warranted, award the complainant its actual damages, together with costs and attorneys fees. *See* 49 U.S.C. §§ 10706, 10762, 11705.

An exhaustive review of the legislative history of the Reed-Bulwinkle Amendments is found in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, No. 84-7831 (2d Cir. Apr. 9, 1985), in which the court rejected every argument pressed by plaintiffs here, and concluded that the rule of *Keogh* is still valid.[7] In light of the admirable summary presented by Judge Friendly in *Square D*, I will present here only a brief capsulization of the relevant history. In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 401 (1945), decided shortly before the enactment of Reed-Bulwinkle, the Court held that *Keogh* barred Georgia from recovering treble damages in its *parens patriae* suit against defendant railroads for price-fixing on the basis of rates paid by private shippers. The Court noted, however, that *Keogh* was not a bar to government or so-called public antitrust actions against the railroad; nor did it prevent private shippers from obtaining injunctions against conspiratorial behavior, a matter not within the jurisdiction of the ICC. *See id.* at 454-55. Nor does *Keogh* apply to suits by competitors. *See, e.g., Pinney Dock and Transport Co. v. Penn Central Corp.*, No. C80-1733, slip op. at 46 (Memorandum and Order denying Motion to Dismiss) (N.D. Ohio Aug. 26, 1983).

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rates. In any event, much of the conspiracy here alleged occurred before the enactment of the amendments alluded to above, and plaintiffs have not suggested that these amendments are in any way outcome determinative.

[7] As transferee judge, I am bound to apply the law as if I were sitting in the transferor district. *See Manual for Complex Litigation* § 5.22 n.410 at 197 (2d ed. 1984). Hence, I am bound by the Second Circuit's determination in *Square D, supra*, in ruling on the present motion in the *Republic Steel* case, which was filed in the Southern District of New York. The other four cases were filed in the District of Columbia; I am aware of no binding precedent treating *Keogh* in that Circuit.

There being a general consensus to the effect that the public would be better served by filling some of the gaps alluded to in *Georgia*, at least to the extent that railroads could not be subjected to antitrust liability by any entity for the appropriate joint setting of rates, routes, fares, classifications, etc., Reed-Bulwinkle was enacted. As Judge Friendly points out in *Square D*, Congress had been reminded of *Keogh* several times during the hearings that preceded the bill's enactment (*see Square D, supra*, slip op., at 3269-70), and nevertheless announced:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body . . . .

H.R. Rep. No. 1100, 80th Cong., 2d Sess., *reprinted in* 1948 U.S. Code Cong. & Ad. News 1844, 1848 (emphasis added).

Several courts have thus rightly held that *Keogh* was not swallowed up by Reed-Bulwinkle. *See, e.g., Square D, supra; In the Matter of Wheat Rail Rate Antitrust Litigation*, Nos. 84-1883, 84-1505 (7th Cir. Apr. 17, 1985). As I noted above, *Keogh* held that shippers could not pursue antitrust claims for treble damages against railroads on the basis of filed rates (although plaintiffs dispute this latter characterization, *see* discussion *infra*). Reed-Bulwinkle extended that protection by granting immunity against suits from all comers, not simply shippers, for all matters, not simply filed rates, that were jointly undertaken in compliance with an ICC-approved agreement; thus, the simple act of filing rates would not be sufficient to warrant Reed-Bulwinkle protection, but would, under the right circumstances, warrant *Keogh* protection. In view of Congress' expressed intention that Reed-Bulwinkle only add to the railroads' existing antitrust protection, it would be improper to shun *Keogh* on this basis.

Finally, as Judge Friendly noted:

> Beyond this, the legislative history contains no suggestion of any intention to overrule *Keogh*, and it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect.

Square D, supra, slip op. at 3269.

Plaintiffs next contend that their cases do not fall within the proscriptions of *Keogh*, since (1) *Keogh* was a "rate" case, and in this case a much broader conspiracy is alleged, rates being only a "symptom" of the problem, and (2) the rates in *Keogh* had been approved by the ICC, whereas the rates charged here were simply filed with the ICC, thus occasioning no conflict between agency and court jurisdiction.

I do not find these arguments persuasive. Although it is true that the conspiracy alleged goes farther than the mere fixing of rates, that does not divest the court of its duty to ensure that antitrust immunity is afforded as the law directs. The attempts of both sides of this litigation to label it as a rate matter or a monopolization matter do little to advance the inquiry. I am aware of no law that dictates that I view these actions with tunnel vision; on the contrary, a legal line has been drawn by the *Keogh* court which I am not free to cross, no matter how "artificial" it may seem to plaintiffs. *See, e.g., Square D, supra*, slip op. at 3248-49, 3282 ("A shipper [should be allowed to amend its complaint and] may recover damages if it can show that carriers caused injury to the shipper's business or property other than by higher tariffs, such as by impeding its ability to transport its goods to other markets and thus decreasing its sales."). The portion of plaintiffs' damage claims which involves rates must, under *Keogh*, be separated from the rest of the action.

And this is so whether the rates at issue have been approved by the ICC or simply filed with that body. *See*,

e.g., Square D, supra, slip op. at 3280. As noted above, Justice Brandeis clearly stated in *Keogh* that the filed rate is "the legal rate" under the ICA unless and until the rate is disallowed by the ICC or otherwise displaced. 260 U.S. at 163. Notwithstanding this straightforward language, plaintiffs argue that subsequent Supreme Court decisions have revealed that ICC approval is a prerequisite to *Keogh* immunity. In *Hanover Shoe, Inc. v. United Shoe Machinery, Inc.*, 392 U.S. 481 (1968), the Court rejected the "passing on" defense to claimed overcharges in antitrust suits. The *Hanover* Court took note of *Keogh* in a footnote, since Justice Brandeis had appeared to give credence to that defense. He wrote that the same legal rate had been exacted from all shippers, and that a lower rate (one that would have existed but for the conspiracy)

> might not have benefited [*Keogh*] . . . . Under these circumstances, no court or jury could say that, if the rate had been lower, *Keogh* would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer.

Keogh, 260 U.S. at 165. The *Hanover* Court stated that in *Keogh* "[b]ecause the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws . . . . We ascribe no general significance to the *Keogh dictum* for cases where the plaintiff is free to prove that he has been charged an illegally high price." *Hanover*, 392 U.S. at 491 n.8. It is thus clear that the concern of the *Hanover* Court was to distance itself from one of several arguments advanced by Justice Brandeis in support of his ruling in *Keogh*. The Court did not, and indeed had no need to focus on the issue of filed rates versus approved rates. Hence, it would be folly to hold that the

dictum in *Hanover* rejecting the dictum in *Keogh* in any way detracts from the holding of the latter.[8]

In *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 20 (1966), the Court held that a shipper in foreign commerce could maintain an antitrust action for treble damages against maritime conferences and their members based on rates set without prior approval of the Federal Maritime Commission (FMC) pursuant to the Shipping Act. The Shipping Act, like the ICA, provides the commercial maritime industry with limited antitrust immunity for rates jointly set in accordance with FMC-approved agreements. *See* 46 U.S.C. § 814. Without mention of *Keogh*, the Court held that if rates were set pursuant to an unapproved agreement, the carriers could be subjected to antitrust liability for joint rate-setting. Paying due heed to the doctrine of primary jurisdiction, the Court concluded that such an antitrust action, whether for damages or for an injunction, should be stayed pending the FMC's resolution of whether the rates were set in conjunction with an approved agreement. *Id.* at 221, 223. If the FMC should find that the rates were not lawfully set, the shipper would then have the option of seeking recovery under the Shipping Act or under the antitrust laws. *Id.* at 224.

The shippers in the present cases do not overtly argue that *Carnation* overrules *Keogh sub silentio*, but that it limits its application to approved rate cases. But the *Carnation* Court was concerned with unapproved agreements, not unapproved rates.[9] Moreover, it was construing an

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[8] The same may be said with respect to *Terminal Warehouse Co. v Pennsylvania R.R. Co.*, 297 U.S. 500 (1936), which the plaintiffs argue is inconsistent with *Keogh*. But, although the *Terminal Warehouse* Court found *Keogh* "apposite and helpful", it stated that it was not "decisive". *Id.* at 511. Its musings regarding when an antitrust action may be pursued by a shipper are dicta and cannot be construed to alter *Keogh*. *Id.* at 515.

[9] Indeed, one might venture that if *Keogh* were to be read as an approved rate case, the *Carnation* Court would have cited it as support for its position that in un- or disapproved rate cases, an antitrust action could lie.

exemption contained not in the ICA, but in the Shipping Act, a statute which, albeit similar in many respects to the ICA, is not at issue in the present cases. Nor was the *Keogh* Court confronted with a statutory exemption of any kind, since none existed in the ICA at that time.

Hence, I must reject plaintiffs' contention that *Keogh* does not apply to this case, and with it their arguments regarding the changing regulatory climate. *Keogh* continues to be cited by the Court as good law. *See, e.g., ATA v. McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980). *See also Minsky v. Auto Driveway Co.*, 757 F.2d 718 (7th Cir. 1984); *Square D, supra; Wheat Rail Cases, supra; Essential Communication Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3d Cir. 1979). Although plaintiffs may well be correct in arguing that the Supreme Court would elect to overrule *Keogh* if it had the opportunity to do so today, that is not for this court to decide.

Thus, insofar as plaintiffs' damage claims are based on rates charged the plaintiffs by defendant railroads -- all dock-handling and storage rates at railroad docks and railroad line haul rates (class or commodity) from private and railroad docks -- their claims will be dismissed.

As I read the various complaints, this leaves the steel companies with two presently animated antitrust claims: (1) that they could have paid lower dock-handling rates (sooner) to the private docks than they did to the railroad docks if the railroads had not retarded the development of the self-unloader industry; and (2) that they could have paid lower land transport rates (sooner) to the truckers, had the railroads not restrained competition by that industry and monopolized line-hauling from their docks.[10] In my view,

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[10] In Jones & Laughlin's summary of facts, presented to the transferor court but not alluded to in its present motion to dismiss, it contends that the railroads intended to "cramp" the trucking industry by, *inter alia*, threatening "elimination of services to steel companies." Puzzlingly, however, no such allegation of a refusal to deal by the railroads is found in any of the present steel company complaints, nor for that matter, in the

plaintiffs' generalized claims regarding savings they would have realized had defendants not impeded self-unloader development and had they been able to choose the most economic combination of transportation alternatives come within these two categories.

Defendants vigorously contest plaintiffs' standing to pursue these remaining claims.

B. Antitrust Standing

The definition of who may be an antitrust plaintiff has been an elusive one. From the wording of § 4 of the Clayton Act (15 U.S.C. § 15), one might not have imagined that such a problem would evolve:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

Read literally, this all-encompassing language would seem to contemplate litigation recoveries by all who claim to have suffered any form or degree of antitrust injury. But the courts do not read this section literally; indeed, over the years, the appellate courts have devised a variety of tests, through which prerequisites for maintaining suit beyond the simple allegation of injury have been engrafted upon this language. *See Merican, Inc. v. Caterpiller Tractor Co.*, 713 F.2d 958, 964, n.12 (3d Cir. 1983) (and cases cited therein).

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complaints of the trucking companies. Hence, none is now properly before the court.

In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), the Supreme Court attempted to harmonize the various standards by setting forth a list of factors which are to "circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 537. As elucidated by our court of appeals in *Merican, supra*, those factors are (1) the causal connection between the alleged antitrust violation and the harm to plaintiff (specific intent to harm plaintiff is not required); (2) the nature of plaintiff's injury (Is it the sort of injury Congress intended § 4 to address, and does it flow from the unlawful nature of defendant's acts?); and (3) the directness or indirectness of the injury. *Merican*, 713 F.2d at 964-65 & nn.13-15 (citing *Associated General Contractors*, 459 U.S. at 537-40).

The latter factor requires an analysis of (a) whether there exists "an identifiable class of persons whose self-interests would normally motivate them to vindicate the public interest"; (b) the speculative nature of the damages; (c) the potential for duplicative recovery; and (d) the danger of the court becoming involved in complex apportionment of damages. *Associated General Contractors*, 459 U.S. at 541-44; *Merican*, 713 F.2d at 965 n.15. This final set of considerations is precisely the one focused upon in *Hanover Shoe, Inc., supra*, and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); in *Hanover*, the Court rejected the "passing on" (of the overcharge) defense to the claim of an innocent middleman in a price-fixing scheme, and in *Illinois Brick*, the Court completed its thought: it barred the indirect purchaser from maintaining an antitrust action based on the overcharge.

Although plaintiffs clearly allege the requisite form of injury, and thereby satisfy the second requirement of *Associated General Contractors*, their claims cannot withstand the scrutiny mandated by factors 1 and 3.

With respect to factor 3, the Third Circuit's opinion in *Mid-West Paper Products Co. v. Continental Group*, 596 F.2d

573 (3d Cir. 1979), is instructive. The *Mid-West Paper* court applied the *Hanover Shoe-Illinois Brick* rationale to a case without a middleman,[11] a case analogous in many respects to those presently under consideration. The court held that a customer of a non-conspiring competitor of defendant supplier could not maintain an antitrust action based on an "umbrella" pricing theory (*i.e.*, the notion that the effect of defendant's conduct in an oligopolistic market was to inflate the prevailing market rates charged by all competitors in the relevant market, and not simply by defendant). In an analysis which mirrors that prescribed by *Associated General Contractors*,[12] the Court conceded that the nature of plaintiff's injury was within the reach of the antitrust laws (factor 2), but ruled that the chain of causation was too speculative (factor 1) and the amount of the damages too conjectural (factor 3). *Id.* at 584. Said the Court:

> The outcome of any attempt to ascertain what price the defendants' competitors would have charged had there not been a conspiracy would at the very least be highly conjectural. As noted in *Hanover Shoe*, "[a] a wide range of factors influence a company's pricing policies. Normally, the impact of a single change in the relevant conditions cannot be measured after the fact; . . . ."

Id.

The *Mid-West Paper* opinion was not met with universal agreement (*see, e.g., In re Uranium Antitrust Litigation*, 552 F.Supp. 518, 523 (N.D. Ill. 1982) (and cases cited therein).[13]

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11 Criticism of the *Mid-West Paper* court should now be abated in light of the ruling in *Associated General Contractors* to the effect that these factors are of concern in any antitrust case.

12 The *Mid-West Paper* analysis was cited with approval by the post-*Associated General Contractors Merican* court. *See* 713 F.2d at 965 n.15.

13 But neither the Second Circuit nor the District of Columbia Circuit has rejected *Mid-West Paper;* indeed, the Second Circuit embraced its reasoning in *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10,

Nevertheless, I am persuaded that the *Hanover Shoe-Illinois Brick* rationale applies with even more force in the present circumstances (where plaintiffs are only potential customers of non-conspiring competitors) than in the *Mid-West Paper* scenario. With respect to plaintiffs' first claim -- that they could have paid less sooner to the private dock owners had the railroads not retarded the development of self-unloaders -- the plaintiffs ask the Court to engage in an exercise in prophecy. I have not lost sight of the fact that plaintiffs claim they can prove that the private docks did charge less than the railroads when they finally began to avail themselves of the self-unloaders. Nevertheless, had the railroads not interfered, when would the private docks have begun to handle the self-unloaders? Moreover, even if a date could be pinpointed with reasonable accuracy, there is no assurance that the rate charged would be the rates alluded to by plaintiffs. As the *Mid-West Paper* court observed, quoting *Hanover Shoe*, "[a] wide range of factors influence a company's pricing policies." 596 F.2d at 584 (quoting 392 U.S. at 492). This is precisely the sort of complex apportionment of damages which the Supreme Court has warned must be avoided. Furthermore, there exist in this litigation two identifiable classes which are actively pursuing their antitrust remedies against the defendants -- the self-unloader manufacturer, Litton, and the non-railroad dock owners, Pinney and Erie-Western.

I also note my firm belief that these damages are actually claims for overcharge in other clothing.[14] Although plaintiffs claim to be seeking recovery for "lost savings," this is only an exercise in semantics. What plaintiffs actually seek is reimbursement for the inflated rates they suffered as a result of defendants' predatory practices; while this brings

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14 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981). Hence, I perceive no problem with alluding to it here. *See* n.7 *supra*.

[14] The tortured nature of the description of the surviving claims is probably in direct proportion to the tenuousness of their causation. In any event, I need not rule on this factor in view of the findings expressed above.

plaintiffs out from under the constraints of *Illinois Brick* (*i.e.*, they are no longer indirect potential purchasers), it runs them squarely into the brick wall of *Keogh*.[15]

I need not repeat the above analysis with respect to plaintiffs' claim for denied savings on truck hauling because of defendants' conspiratorial and monopolistic behavior; it is the same. I will only add that five trucking concerns are currently pursuing their antitrust remedies against the defendants in this MDL.

All of plaintiffs' damage claims must therefore be dismissed. But plaintiffs will be granted leave to amend their damage claims in accordance with this Memorandum, if it is possible for them to do so. *See Square D*, slip op. at 3248-49 (quoted at p. 12 *supra*).

II. PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF

Neither *Keogh* nor the antitrust standing restrictions that have grown out of § 4 affect plaintiffs' ability to maintain actions for injunctive relief (although, curiously, no one has addressed this issue). *See, e.g., Square D*, slip op. at 3280-81; *Weiss v. York Hospital*, 745 F.2d 786, 806-07 (3d Cir. 1984). The only possible complication with respect to this issue is whether the discretionary doctrine of primary jurisdiction

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[15] No matter which view is taken of these claims, *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), which plaintiffs advance in support of their position, is inapposite. In *McCready*, plaintiff challenged Blue Cross' policy of refusing to reimburse subscribers for fees paid to psychologists for psychotherapy, while at the same time reimbursing such fees when paid to psychiatrists. The Court noted at the outset that the *Illinois Brick* rationale did not apply since there was no risk of duplicative recovery and nothing speculative about the damages (precisely equal to McCready's out-of-pocket expenses). Moreover, the court observed that McCready's injury was not remote, since "it was a necessary step in effecting the ends of the alleged conspiracy." *Id.* at 479. *McCready* is readily distinguishable from the present litigation since here the indirect damages are clearly speculative and since the savings allegedly denied the plaintiffs did not constitute a "necessary step" in the effectuation of the conspiracy -- they are consequential. And I note, parenthetically, that *McCready* cannot be construed to impinge on the holding of the later-decided *Associated General Contractors*, *supra*.

requires that the actions be stayed pending referral to the ICC. In my view, neither stay nor referral is required.

The policy underlying primary agency jurisdiction is to avoid conflict between the roles of court and agency, and to utilize special agency expertise while conserving the resources of the court. In these actions, plaintiffs seek a finding that defendants' conduct violated antitrust laws and an injunction ordering an end to that behavior and barring defendants from resorting to such illegal combinations in the future. The ICC does not have the power to issue such an injunction. *See Georgia*, 324 U.S. at 454-55, *cited in Square D*, slip op. at 3281. Moreover, there are no underlying facts to be established that could best be sifted by the ICC; the issue here is not whether the railroads conformed to a rate agreement, but whether they engaged in a broad-based conspiracy. As a panel of the District of Columbia Circuit noted in the criminal adjunct to this civil litigation:

> [Reed-Bulwinkle] immunity reaches only those actions factually taken "in conformity with" the rate agreement and the terms and conditions laid down by the ICC. It does not sweep within it a larger conspiracy which utilizes a Section 5a rate bureau as a means to an end; it does not legitimate illegal schemes which happen to coincide at points with the legitimate actions of a rate bureau.

United States v. Bessemer and Lake Erie R.R. Co., 717 F.2d 593, 600 (D.C. Cir. 1983).

In view of this, I perceive no reason why the matter, now devoid of all rate-based damage claims, should be referred to the ICC; plaintiffs may proceed with their claims for injunctive relief.[16]

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[16] Although, as I noted above, neither Sharon nor National specifically requested injunctive relief, they did include catch-all requests and predicated the court's jurisdiction, *inter alia*, on 15 U.S.C. § 26 (§ 16 of Clayton Act) which addresses injunctive relief. Hence, their complaints will be construed to include such claims.

III. DISTRICT OF COLUMBIA CLAIMS

Plaintiffs Jones & Laughlin, National, and Wheeling-Pittsburgh also charge defendants with violations of the antitrust laws of the District of Columbia. *See* D.C. Code Ann. §§ 28-4501, 28-4502, 28-4503, 28-4508. Defendants assert that these pendent claims must be dismissed since (1) the D.C. Code must be construed in a manner consistent with federal law (which, in light of the conclusions expressed above, would leave standing plaintiffs' injunction claims); (2) none of the trade or commerce alleged to have been restrained is within the District of Columbia; and (3) application of the D.C. Code to these cases would violate the Commerce Clause of the U.S. Constitution.

In my view, defendants' second argument is dispositive; in order to obtain relief under District of Columbia law, plaintiffs must allege that defendants' conduct restrained trade in the District. That law provides:

> Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, all or any part of which is within the District of Columbia, is declared to be illegal.

D.C. Code Ann. § 28-4502. Section 28-4503 provides:

> It shall be unlawful for any person to monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce, all or any part of which is within the District of Columbia.

In my view, the above-quoted language, read together and individually,[17] clearly requires that, before the alleged

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[17] Admittedly, a strained reading of § 28-4501 could lead one to conclude that any conspiracy, etc., any part of which occurs in the District, which has as its effect the restraint of trade anywhere (in or out of the District), is illegal. But the language of the next section counsels that such an interpretation would be unwise; for various reasons of grammatical immutability, it clearly demonstrates that the phrase "all or

offensive conduct can rise to the level of an antitrust violation, it must restrain trade or commerce in the District of Columbia.

In so construing the statutes to require local effect as a jurisdictional prerequisite, I do nothing unusual. I note first that the stated purpose of the law is "to promote the unhampered freedom of commerce and industry throughout the District of Columbia by prohibiting restraints of trade and monopolistic practices." D.C. Code Ann. § 28-4501(b). Clearly, the concern is with local trade.

Second, this chapter of the Code also provides that

> [i]t is the intent of the Council of the District of Columbia that in construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.

Id. § 28-4515. Section 1 of the Sherman Act is a comparable antitrust statute: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . ." (emphasis added). Federal courts routinely construe the emphasized language as a jurisdictional prerequisite which must be pleaded. *See, e.g., McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

In this regard, plaintiffs' complaints are lacking. In their complaints, they allege that all of the defendants reside, are found, transact business, or have agents in the District of Columbia. This allegation may suffice for Sherman Act venue purposes,[18] but clearly does not support plaintiffs'

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any part of which is within the District of Columbia" is meant to modify "trade or commerce," and not "contract, combination . . . or conspiracy." *See also* the following discussion in the text on the chapter's purpose and proposed rules of construction.

[18] In so stating, I express no opinion on the motions of Norfolk and Western Railway to dismiss the *Jones & Laughlin* and *Wheeling-Pittsburgh*

claims for breach of the substantive law of the District of Columbia. In further support of venue in the District, Jones & Laughlin and Wheeling-Pittsburgh (but not National) do allege that "[c]ertain of the unlawful acts alleged herein were performed or had effects within the District of Columbia." Complaints of Jones & Laughlin and Wheeling-Pittsburgh, ¶ 2 (emphasis added). But in those portions of their complaints entitled "Trade and Commerce", these plaintiffs (and National) state only that "[t]he violations of law alleged herein occurred in and substantially and adversely affected interstate and foreign commerce." *Id.* at ¶ 14; *see also* complaint of *National*, ¶ 9.

National thus makes no allegation of restraint of trade in the District of Columbia, while the allegations of Jones & Laughlin and Wheeling-Pittsburgh in that regard are, at best, ambiguous. In response to the present motions to dismiss, the latter argue only that they have "alleged a conspiracy which took place, at last [sic] in part, within the District of Columbia."[19] Brief of Jones & Laughlin at 76 (emphasis added). Curiously, in response to defendants' square challenge on the issue, plaintiffs do not even allude to the "effects" language contained in the venue allegations of their complaints.

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actions for lack of venue. That motion will be addressed in a subsequent Memorandum and Order.

[19] Jones & Laughlin points out in its summary of facts that in the companion criminal case, it was established that two overt acts evidencing the conspiracy occurred in the District of Columbia: (1) the filing of tariffs with the ICC, and (2) a meeting of the conspirators on July 6, 1976, to discuss trucking competition. Summary at 30. Even assuming that I could properly take note of these "facts", plaintiffs' claims would still be deficient, since, in my view, the fact that a part of the conspiracy occurred in the District of Columbia (while perhaps sufficient to establish venue, *but see* n.18 *supra*) is in itself insufficient to state a claim under District law. *See* n.17 *supra*.

Hence, I conclude that none of the three plaintiffs has properly pleaded its District of Columbia claims. Those claims will therefore be dismissed, but with leave to amend.

An appropriate Order follows.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE
	:	NO. MDL 587
THIS DOCUMENT RELATES TO	:	
JONES & LAUGHLIN STEEL, INC.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2135
REPUBLIC STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP.	:	NO. 84-2079
NATIONAL STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2138
SHARON STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-5562

ORDER NO. 4

AND NOW, this 5th day of June, 1985, in consideration of the motions of defendants Chesapeake & Ohio Railway Co., Baltimore & Ohio Railroad Co., Norfolk & Western Railway Co., Norfolk Southern Corp., Pittsburgh & Lake Erie Railroad Co., Bessemer & Lake Erie Railroad Co., Consolidated Rail Corp., and CSX Corp. to Dismiss the above-captioned actions or for a Stay Pending Reference of Certain Issues to the ICC, and the responses and replies thereto, it is ORDERED:

1. Defendants' Motions are hereby GRANTED with respect to plaintiffs' claim for damages, costs, and attorneys' fees. Said claims are DISMISSED WITHOUT PREJUDICE. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

2. Defendants' motions are hereby DENIED with respect to plaintiffs' claims for injunctive relief.

3. Defendants' motions are GRANTED with respect to the claims of plaintiffs' Jones & Laughlin, Wheeling-Pittsburgh and National for relief pursuant to the District of Columbia Code. Said claims are DISMISSED without prejudice. Plaintiffs may file amended complaints in accordance with the foregoing Memorandum within thirty (30) days of the date of this Order.

/s/ John P. Fullam
J.

ENTERED: 6-6-85

CLERK OF THE COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE NO. MDL 587
THIS DOCUMENT RELATES TO	:	
JONES & LAUGHLIN STEEL, INC. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-2135
REPUBLIC STEEL CORP. v. PENN CENTRAL CORP.	:	CIVIL ACTION NO. 84-2079
NATIONAL STEEL CORP. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-2138
SHARON STEEL CORP. v. PENN CENTRAL CORP., et al.	:	CIVIL ACTION NO. 84-5562

MEMORANDUM AND PRETRIAL ORDER NO. 11

FULLAM, Ch. J. — FEBRUARY 12, 1987

In Pretrial Order No. 4 for this multidistrict litigation, I dismissed plaintiffs' antitrust claims for treble damages, costs, and attorneys' fees. The dismissals were without prejudice, however, and plaintiffs were allowed to file amended complaints. This they did, prompting defendants again to move for dismissal. The renewed motion will be granted in part and denied in part.

I.

Pretrial Order No. 4 details the background of this litigation. Allegations relevant to the present motion, presumed true, are as follows:

Plaintiffs are steel companies that, from the early 1950s through the early 1980s, hired transport for ore from iron mines in Michigan, Minnesota, and Canada, to mills in Pennsylvania and Ohio. The ore traveled overland and aboard ships from the mines to docks on lower Lake Erie, and again overland to the mills.

Through the early 1950s, ore left the mines in a mud-like form containing a relatively low concentration of iron. This raw material crossed the Great Lakes on ships that required special dock unloading equipment. The ships were owned and operated by companies whose conduct is not here being challenged. However, on lower Lake Erie most docks were controlled by defendants and, in Pennsylvania and Ohio, defendants also provided rail facilities used by plaintiffs. To supply these services, defendants invested in equipment to unload and carry the ore in this form.

By the mid-1950s, mines began preparing ore for shipment by processing it into concentrated pellets of iron. This enabled development of cheaper transport services.

Specifically, the ore could be carried in self-unloading ships that obviated much of the old dock equipment and, for some inland routes, could be carried more efficiently by trucks than by trains. Whenever introduced, these services would have saved plaintiffs money.

Recognizing the prospect of owning obsolete equipment in markets ripe for picking by competitors, defendants conspired to preserve (or increase) their profit margins. In concert, they fixed prices for dock and rail services that exceeded the amounts chargeable in fairly competitive markets. The set prices were protected by coordinated action to frustrate use of self-unloaders for lake transport, provision of dock services by independent operators, and truck carriage of ore.

The protective strategy capitalized on defendants' dominance of the market for dock services on the lower Lake Erie shore. At the docks they controlled, defendants sometimes refused to permit self-unloaders to discharge cargo and sometimes refused to let trucks pick up ore. When self-unloaders and trucks could gain access to the docks, defendants imposed non-cost-based charges that significantly reduced or eliminated plaintiffs' economic advantages gained with the new technologies. Moreover, defendants blocked some would-be competitors from buying sites where new docks could be built and, where the blocking strategy failed, interfered with the non-conspirators' construction and operation plans; defendants also discouraged investment in self-unloaders by lake transporters. Thus, for many years defendants postponed full-scale implementation of a new transport system whereby pelletized ore could be shipped on self-unloaders, modern docks, and trucks, perpetuating a more costly system of shipping by outdated vessels, wasteful docks, and trains.

II.

These facts, if true, would demonstrate violations of the Sherman Act §§ 1 & 2, 15 U.S.C. §§ 1 & 2. They allegedly caused treble-able damages that plaintiffs, at pages 3-4 of their brief opposing dismissal, sort into seven categories (¶¶ 1-7). These claims will be assessed in four groups.

A.

All plaintiffs identify harms based on hypothetically lower prices that, but for the conspiracy, defendants would have charged for dock and rail services. Generally, plaintiffs claim "damages directly resulting from defendants' fixing the charges paid by plaintiffs for unloading, transshipment and inland transportation services at artificially high and non-competitive levels." ¶ 7. Particularly, they claim "damages directly resulting from charges by defendants for unloading and transshipment services never rendered to plaintiffs." ¶ 5. Under either theory, recovery would require estimation of what charges would have been accepted by the Interstate Commerce Commission (ICC).

Such an inquiry is forbidden by *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), *reaffirmed in Square D Company v. Niagara Frontier Tariff Rate Bureau, Inc.*, 106 S. Ct. 1922 (1986). "In *Keogh*, the Court held that an action for damages consisting of the difference between rates set illegally and the rates that would have been set absent a conspiracy was barred because plaintiff's sole remedy was an action before the ICC." *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985); *see also Minsky v. Auto Driveway Co.*, 757 F.2d 718, 720 (7th Cir. 1984) ("A customer of a carrier, who was charged the filed rate, cannot maintain an antitrust action against the carrier for an alleged conspiracy in setting the rate.") (emphasis original). *Keogh* applies whether filed tariffs "result from a combination to file higher tariffs or from a combination to prevent others from taking

independent action to file lower tariffs," *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1365 (2d Cir. 1985) (Friendly, J.), *aff'd*, 106 S. Ct. 1922 (1986), and applies even when defendant carriers cover up their conspiracy by failing to follow procedures specified in an agreement with the ICC, *In re Wheat Rail Freight Rate*, 759 F.2d 1305, 1313-16 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2275 (1986). Under this precedent, I will dismiss these claims.

B.

Concerning the market for lake transport services, plaintiffs make two sets of claims. National Steel Corporation, with an in-house fleet, claims "damages directly resulting from defendants' delay and suppression of National's use of self-unloader technology . . . ." ¶ 2. The other plaintiffs, having hired lake transport services, claim "damages directly resulting from defendants' foreclosure of self-unloading vessels . . ." from the lake transporters' fleets. ¶ 1. These claims depend on proof that plaintiffs would have realized savings whenever lake transporters began using self-unloaders.

1.

By quantifying the costs saved by lake transporters using self-unloaders, and from evidence of the lake transport industry rates of return, plaintiffs other than National offer to prove what prices they would have been charged for lake transport of ore. Such an endeavor might make sense in another context, but not to justify treble damages under the federal antitrust laws.

Notwithstanding the broad language in 15 U.S.C. § 15, Congress clearly intended to limit the type of harms entitling victims to treble damages. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 529-35 (1983). Although "the infinite variety of claims that may arise" has prevented

announcement of "a black-letter rule that will dictate the result in every case," the Supreme Court instructs that "previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id.* at 536-37. The case most relevant for the present purposes is *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

In *Illinois Brick*, the Court "held that treble damages could not be recovered be indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy." *Associated General Contractors*, 459 U.S. at 544. To hold otherwise, the Court explained, would have created great unavoidable difficulties: if indirect purchasers could recover while suppliers' claims against defendants were not correspondingly reduced, antitrust violators would be exposed to hextuple damages, far more than Congress envisioned and engendering complicated evidentiary efforts by indirect purchasers to prove how, precisely, the increased price charged to suppliers generated in increased prices charged by suppliers, 431 U.S. at 730-32; if courts attempted to apportion the harm suffered between suppliers and indirect purchasers, the pressure to adjudicate in one action the claims of all persons affected in some way by the conspiracy would create massive lawsuits with concomitant complexity, *id.* at 731 n.11 & 737-45. By preventing indirect purchasers from suing and by reaffirming the rule that defendants could not argue that indirect rather than direct purchasers were injured by antitrust violations, *id.* at 736-37 (citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)), the Court minimized the potential for complexity and gave one class of plaintiffs the full statutory incentive to sue, thus maximizing the chance that the most directly injured party would enforce the antitrust laws.

The problems recognized in *Illinois Brick* are not limited to circumstances where defendants conspire to effect above-market fixed prices on sales to providers of goods or services to indirect purchasers. Therefore, in each case involving

purchasers from providers of goods or services whose prices might be elevated because of defendants' antitrust violations, as here, judges must consider the policies underlying *Illinois Brick* to decide if lawsuits by the indirect purchasers could enable improper duplicative recovery or massive and complex litigation. *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 967-68 & n.20 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984). In general, under the "mutuality" principle, an indirect purchaser may sue if and only if the antitrust defendant may argue for a corresponding reduction in the provider's damages. *Illinois Brick*, 431 U.S. at 728.

Justifications for such actions constitute passing-on theories. "Absent unusual circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense." *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1157 (5th Cir. 1979) (Wisdom, J.), *cert. denied*, 449 U.S. 905 (1980). Unusual circumstances have been recognized when the amount passed on is indisputably determinable, as with cost-plus contracts, and when the provider is either owned or controlled by a plaintiff or functionally united with a defendant, as a division or co-conspirator. *E.g.*, *Illinois Brick*, 431 U.S. at 735-36 & n.16; *see also von Kalinowsky, 16G Business Organizations: Antitrust Laws and Trade Regulations* § 101.02[3] n.35 (Nov. 1986 *Supp.*) (collecting cases). Neither exception is pled in this case.

Instead, plaintiffs' claims for damages in the lake transport market closely resemble the claim made in *Hanover Shoe*. There, defendants attempted to monopolize a market by leasing, but refusing to sell, certain advanced technology. 392 U.S. at 483-84. This supported an action by would-be buyers of the machines, who could have reduced their production costs. *Id.* at 487. Defendants unsuccessfully urged the Supreme Court to approve a passing-on theory to the effect that plaintiffs were not damaged; in view of the prices then charged their customers (indirect purchasers). *Id.* at 487-94. Under the mutuality principle, those indirect

purchasers could not have sued defendants for potential reduced shoe prices that, but for the conspiracy, plaintiffs would have set. In the present context, by analogy, I conclude that the steel company plaintiffs other than National cannot succeed on this claim; damages related to the lake transport market should be pursued by more directly injured plaintiffs, the transporters that could have reduced their costs but for the conspiracy.

In response, plaintiffs suggest that a simple proceeding could allocate damages between lake transporters and the mills. They propose to prove the price that, but for defendants' conspiracy, lake transporters would have charged. The Supreme Court, however, has anticipated difficulties in such an endeavor: "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, . . . for example), he would have chosen a different price." *Id.* at 492-93. Accordingly, I reject plaintiffs' suggestion and will dismiss claims based on potential savings in the lake transport market by plaintiffs other than National.

2.

National's claim for damages in the lake transport market depends on evidence that defendants' actions delayed introduction of the cheaper self-unloader technology by National; it does not implicate any hired lake transporters. No *Keogh* problem arises because damages will not be measured by reference to any tariffs filed with the ICC and, allegedly, the damages in significant part flow from defendants' illegal activities other than price-fixing. *See also Square D*, 106 S. Ct. at 1925 (acknowledging the Second Circuit's decision that plaintiffs could amend their complaints to state possible claims for damages not arising from the filed tariffs"); *Barnes*, 759 F.2d at 679 (*Keogh*

inapplicable to antitrust violation interfering with markets tangential to those where defendants do business). Further, National's claim should not be barred by the rule against unduly speculative actions, because the causal connection is reasonably alleged, the injury is of a type Congress intended to prevent, no potential plaintiff suffers from this injury more directly, and no other plaintiff could pursue such recovery. *See Associated General Contractors*, 459 U.S. at 536-45.

Defendants respond with two contrary arguments. First, they suggest that National's claim should be dismissed because it creates potential for duplicative recovery. This might occur because National's claim depends on proof of its costs to buy self-unloaders, and Litton Industries also may be claiming damages for lost sales of such vessels (or parts thereof) to National, *see Litton Industries, Inc. v. Penn Central Corp.*, No. C81-372 (N.D. Ohio). Given separate trials, it is argued, the price of sale proven by Litton may, to defendants' detriment, exceed the cost of purchase proven by National.

Assuming *arguendo* that Litton can claim treble damages for lost sales to National, the potential for duplicative recovery is not impermissible. Defendants' antitrust violation affects the price of self-unloaders only to the extent that economies of scale come into play. This uncertainty cannot be of the type feared by the Supreme Court, because otherwise all companies losing business due to antitrust activity would face a claim-barring uncertainty in the cost of their inputs for production. This shows that defendants' first argument proves too much. I reject it.

Defendants' second, related argument is that too much speculation would attend any attempt to prove how rapidly the self-unloader technology would have developed. I disagree.

It cannot be denied that the technology did develop, so the only question is how much earlier the technology would

have been introduced, absent the alleged antitrust violations. Although this involves some uncertainty, if National can prove that defendants did delay use of self-unloaders, it proves a real harm; the magnitude of harm being made uncertain by defendants' acts, and National, as a buyer of the product, being a party well placed to develop the facts, the claim is not too speculative. *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (recognizing "practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market"). Accordingly, I will not dismiss National's claim for excessive costs incurred in lake transport.

C.

Republic Steel Corporation claims "damages directly resulting from the delay in the construction and use of Republic's own dock facilities for the unloading and transshipment of iron ore." ¶ 4. These facilities allegedly would have served self-unloaders at a net cost below the prices defendants charged, but were delayed both by the delay in building a self-unloader fleet and by defendants' blocking strategies involving docks and inland transport.

This claim provokes a two-pronged response by defendants. First, citing *Associated General Contractors*, defendants argue that the claim entails too much speculation to prosecute. However, any uncertainties relate to the measurement, not the direct causation of damages, and if defendants did violate the antitrust laws then they created the uncertainties. For the reasons I rejected the speculation defense with respect to National's individual claim, I reject the speculation defense with respect to Republic's individual claim. *See also Pinney Dock & Transport Co. v. Penn Central Corp.*, 600 F.Supp. 859, 882-85 (N.D. Ohio 1983) (allowing claims by a non-railroad dock that allegedly lost business due to defendants' conspiracy).

Defendants also argue that *Keogh* bars Republic's claim. This would require an untenably broad reading of *Keogh*, to the effect that if a party pays for services under a tariff filed with the ICC, then the party never can claim that antitrust violations prevented use of a cheaper but otherwise equivalent service.

Keogh stands for the proposition that legislation creating the ICC's regulatory authority causes an implied repeal of the antitrust laws "only . . . in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 351 & n.29 (1963); *see also United States v. Radio Corp. of America*, 358 U.S. 334, 347-48 (1959) (*Keogh* "emphasized the need for administrative uniformity and uniform rates"). Such plain repugnancy exists with respect to the determination of rates that defendants would have charged, but not with respect to costs that Republic would have incurred in operating a dock. Indeed, in this claim Republic makes no assertion that defendants' dock tariffs were illegal, but only for damages caused by actions outside the ICC's exclusive jurisdiction, those constituting an illegal blockade of what, in effect, would have been a competitor dock.

Competitor docks retain power to sue defendants in this case, *Keogh* notwithstanding. *Pinney Dock*, 600 F.Supp. at 878-82; *see Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1121-22 (3d Cir. 1979). These docks will attempt to establish what, but for the conspiracy, would have been their costs, prices, and volume of business. Republic similarly deserves the chance to prove what would have been its costs and volume of ore off-loaded, from which its damages may be calculated. Accordingly, I will not dismiss Republic's claim for excessive expenditures to obtain dock services.

D.

All plaintiffs join in raising two final claims. They seek "damages directly resulting from defendants' elimination of competitive non-railroad dock facilities from the market of providing unloading and transshipment services to plaintiffs." ¶ 3. They also seek "damages directly resulting from defendants' elimination of competition from trucking in the market of inland transportation services to plaintiffs." ¶ 6. These claims both depend on proof that the conspiracy delayed competitors' entry into defendants' markets (for dock services and inland transport) and that the competitors' prices (for docks tailored to self-unloaders and for trucks) would have undercut defendants' prices, with damages to be calculated by multiplying the difference between defendants' actual and the competitors' probable prices times the volume of ore shifted from defendants' carriers to the competitors' carriers.

In response, defendants argue that *Keogh* and *Associated General Contractors* preclude plaintiffs' claims. I disagree.

1.

With respect to *Keogh* analysis shows that these claims resemble Republic's individual claim (discussed in II.C). Plaintiffs need not prove what prices, but for the conspiracy, defendants would have charged; plaintiffs need prove only that, in the context of tariffs that I must accept as legitimate, defendants' exclusionary activities and other antitrust violations slowed penetration of the relevant markets by defendants' competitors. Thus, plaintiffs' damages do not depend on proof of price-fixing by defendants, which *Keogh* would bar, but on proof that defendants conspired to exclude low-cost competitors from the market, which does not implicate the ICC's exclusive jurisdiction and therefore is not barred by *Keogh*. In short, as Judge Friendly has explained, "[a] shipper may recover damages if it can show that carriers caused injury to the shipper's business or

property other than by higher tariffs . . . . " *Square D*, 760 F.2d at 1365; *cf. Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 820-21 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (notwithstanding defendants' non-liability for monopolistic pricing, plaintiffs may claim in court that tying arrangements violated antitrust laws). Accordingly, I will not rely on *Keogh* to dismiss these claims.

2.

With respect to *Associated General Contractors*, analysis requires distinguishing two possible components of these claims. To the extent, if any, that plaintiffs purchased dock or inland transport services from non-conspiring transport companies, I will dismiss plaintiffs claims under *Illinois Brick*. *See supra* II.B.1. However, to the extent that plaintiffs purchased services from defendants, I will not dismiss the claims.

Plaintiffs straightforwardly allege that, but for the conspiracy, competitors would have provided substitute dock and inland transport at prices below those charged by defendants. As defendants' customers, plaintiffs allege direct injury, not injury passed through an intermediate provider. Thus plaintiffs claim to suffer one of the greatest antitrust harms, an inability to seek lower prices from competitors destroyed or delayed by an illegal conspiracy.

Further, where conspirators act to dissuade potential competitors even from trying to enter a market, as is alleged in this case, the conspirators reduce (sometimes to zero) the number of competitor plaintiffs with standing to sue. Such standing requires proof of preparation and intent to enter the market. *See Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F.Supp. 440, 443-44 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961); *cert. denied*, 369 U.S. 839 (1962). In general, this preparation may not be undertaken by companies well suited to compete, because such efforts would not appear worthwhile, if conspirators impose

sufficient barriers; in particular in this case, few trucking companies have filed suit. To the extent that potential market entrants eschewed substantial preparations, only defendants' customers are in a position to prosecute antitrust actions.

Finally, often in such circumstances, as here, defendants' customers have the most information and greatest incentive to start litigation. Uncertainties in the measurement of damages will remain, but these will be due to defendants' actions and should not impose an absolute barrier to recovery by defendants' customers.

Defendants argue that the potential for excessive speculation and duplicative recovery should preclude these claims. With respect to the inland transport claims, however, it cannot be denied that numerous trucking companies did business in Ohio and Pennsylvania, so that even if few truckers substantially prepared to enter the market, a market price for truck carriage will be determinable. Likewise, the prices for dock services may be estimated reasonably accurately in various ways (such as by reference to docks servicing self-unloaders in other markets or by reference to the prices charged by Pinney and other non-railroad docks when these docks did open on lower Lake Erie). A similar level of uncertainty did not stop the Supreme Court from affirming a jury verdict of damages in *Thomsen v. Cayser*, 243 U.S. 66 (1917), an early case where ocean transporters illegally prevented competitors from serving shippers.

Given this relative lack of uncertainty surrounding the prices that plaintiffs would have paid for dock and inland transport, there exists little potential for duplicative recovery. This potential should not preclude these claims. *See Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1499-1500 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1513 (1986); *see also Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1087 (6th Cir. 1983).

Similar potentials for speculation and duplicative recovery were present in *Pinney Dock*, 600 F.Supp. at 882-85, but did not bar plaintiff's claims. Likewise, I will not rely on *Associated General Contractors* to dismiss these claims.

III.

With respect to the four surviving sets of plaintiffs' claims, all parties should remain aware that denial of a motion to dismiss does not preclude a grant of summary judgment for defendants, after completion of discovery. An Order follows.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE
	:	NO. MDL 587
THIS DOCUMENT RELATES TO	:	
JONES & LAUGHLIN STEEL, INC.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2135
REPUBLIC STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP.	:	NO. 84-2079
NATIONAL STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2134
WHEELING-PITTSBURGH STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-2138
SHARON STEEL CORP.	:	CIVIL ACTION
v.	:	
PENN CENTRAL CORP., et al.	:	NO. 84-5562

PRETRIAL ORDER NO. 11

AND NOW, this 12th day of February, 1987, it is ORDERED that defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART. Plaintiff's claims for damages will be limited as follows:

1. Jones & Laughlin Steel, Inc. and Republic Steel Corporation shall not recover the damages claimed in their Consolidated Amended Complaint ¶ 43 (a, f, g, & h).

2. National Steel Corporation shall not recover the damages claimed in its Amended Complaint ¶ 33 (a, d, e, f, & h).

3. Sharon Steel Corporation shall not recover the damages claimed in its Amended Complaint ¶ 34 (a, c, e, f, & g).

4. Wheeling-Pittsburgh Steel Corporation shall not recover the damages claimed in its Amended Complaint ¶ 38 (a, d, e, & f).

/s/John P. Fullam
Ch. J.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE LOWER LAKE ERIE IRON ORE ANTITRUST LITIGATION	:	MASTER FILE MDL NO. 587
THIS DOCUMENT RELATES TO: ALL ACTIONS	:	

MEMORANDUM AND ORDER NO. 49

FULLAM, Ch. J. APRIL 19, 1989

SUMMARY OF CONCLUSIONS AND RULINGS ON PENDING MOTIONS FOR SUMMARY JUDGMENT

Trial of these 10 MDL cases is scheduled for early May 1989. The parties have recently completed briefing their numerous motions for summary judgment. It is essential that these motions be decided, as an aid to trial preparation; but time-pressures preclude completion of a full-blown opinion. It is therefore appropriate to set forth my rulings without extended discussion at this time:

For the reasons discussed previously (see Memorandum and Order Nos. 4 and 11), I have concluded that *Keogh* precludes assertion of rate-related claims by shippers. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922). The recent decision of the Sixth Circuit Court of Appeals in *Pinney Dock v. Penn Central Corp.*, 838 F.2d 1444 (6th Cir. 1988) concluded that *Keogh* also rules out rate-related claims

by competitors. I have concluded, however (contrary to a view suggested by my earlier memoranda in this case), that it is appropriate for this court to apply Third Circuit law in all of these MDL cases, essentially for the reasons asserted in *In re Korean Airlines Disaster*, 829 F.2d 1171 (D.C. Cir. 1987). The Third Circuit has intimated a similar view, where federal law is involved. *See In re Pittsburgh & Lake Erie R.R. Co. Securities and Antitrust Litigation*, 543 F.2d 1058, 1065 n.19 (3d Cir. 1976).

Applying Third Circuit law, *see Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114 (3d Cir. 1979), I conclude that *Keogh* immunity does not extend to rate-related claims brought by a regulated defendant's competitors.

On the other hand, many of the claims asserted in this case, whether rate-related or not, and whether asserted by competitors or customers, are barred either because the defendants' alleged conspiratorial activities benefitted, rather than harmed, a given plaintiff, or because barred by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (indirect purchasers), or *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (no antitrust standing).

Defendants' statute-of-limitation arguments are accepted in part and rejected in part: I conclude that the steel company plaintiffs are precluded from recovering damages sustained more than four years before their respective complaints in this action were filed. Not only did they plainly have knowledge of facts which should reasonably have made them aware of a basis for asserting the very claims now being asserted, but it is also clear that they were specifically being urged to support an antitrust suit by Pinney Dock -- at least as early as 1972, and more than four years before the criminal indictment. The indictment did not revive claims theretofore barred. *Cf. Dungan v. Morgan Drive-Away, Inc.*, 570 F.2d 867 (9th Cir.), *cert. denied*, 439 U.S. 829 (1978).

With respect to the Reaney plaintiffs and Erie-Western Port Authority, the record is less clear. Because there may be a factual basis for tolling the statute as to these plaintiffs, the limitations issues in their cases should be decided at trial.

I have concluded that the record is insufficiently clear to permit summary disposition of defendants' argument that none of the Reaney plaintiffs has standing to pursue these claims.

Finally, I have concluded that the plaintiffs have no evidence sufficient to impose liability on Penn Central Corporation for any of the claims asserted in the litigation.

In view of the conclusions summarized above, I now register the following rulings on the pending motions for summary judgment.

I. CLAIMS OF THE REANEY PLAINTIFFS

A. Defendants' motions for summary judgment are granted with respect to claims by these plaintiffs concerning excessive charges for self-unloaders at railroad docks, excessive handling charges from railroad docks, and refusal to sell or lease property to third parties for dock use.

B. In all other respects, defendants' motions for summary judgment are denied as to these plaintiffs.

II. PLAINTIFF-ERIE WESTERN PORT AUTHORITY

Defendants' motions for summary judgment are denied with respect to plaintiffs' claims of refusal to sell an ore dock without restrictions. In all other respects, the rulings set forth above with respect to the Reaney plaintiffs shall apply also to this plaintiff.

III. TRUCKING COMPANY PLAINTIFFS

A. Defendants' motions for summary judgment are granted with respect to the claims of these plaintiffs relating to the alleged suppression of self-unloader technology, denial of line-haul rates, and suppression of (refusal to sell to) private docks.

B. In all other respect, defendants' motions for summary judgment are denied, as to these plaintiffs.

IV. CLAIMS OF THE STEEL COMPANY PLAINTIFFS

A. All rate-related claims asserted by the steel company plaintiffs are dismissed. This includes claims that, but for the alleged conspiracy, these plaintiffs could have obtained lower land-transportation costs, whether it be from the defendants or truckers. All claims of these plaintiffs for damages sustained more than four years before their respective complaints were filed in this litigation are dismissed.

B. Defendants' motions for summary judgment with respect to the steel company plaintiffs' claims relating to economic losses directly sustained by reason of suppression/delay of self-unloader technology/availability are denied, without prejudice to reconsideration at an early stage of the trial, on the basis of specific offers of proof.

V. CLAIMS AGAINST PENN CENTRAL CORPORATION

All claims against the defendant Penn Central Corporation are dismissed.

VI. MISCELLANEOUS

All pending motions not covered by the foregoing rulings are denied.

/s/John P. Fullam
Ch. J.

APPENDIX F

MDL 587

QUESTIONS TO BE ANSWERED BY THE JURY

SHERMAN ACT (§ 1) CONSPIRACY IN RESTRAINT OF TRADE

1. Did the Bessemer & Lake Erie Railroad participate in an agreement, combination or conspiracy in restraint of trade in violation of § 1 of the Sherman Act.

Yes √ No ___

SHERMAN ACT (§ 2): CONSPIRACY TO MONOPOLIZE

2. Did the Bessemer & Lake Erie Railroad participate in a combination or conspiracy to monopolize in violation of § 2 of the Sherman Act?

Yes √ No ___

If you answered "Yes" to either question 1 or 2, answer questions 3 and 4. If you answered "No" to questions 1 and 2, answer question 5.

ACT IN FURTHERANCE

3. Did any participant in the agreement, combination or conspiracy take any act in furtherance of the agreement, combination or conspiracy after October 13, 1977?

Yes √ No ___

4. Did the Bessemer & Lake Erie Railroad withdraw from the conspiracy before October 13, 1977?

Yes __ No √

(a) If so, when?

_____

OHIO VALENTINE ACT

5. Did the Bessemer & Lake Erie Railroad participate in a conspiracy which had the purpose of restricting trade or preventing competition in the transportation of iron ore through or in the State of Ohio in violation of the Ohio Valentine Act?

Yes √ No __

CLAIMS OF REPUBLIC STEEL CORPORATION

6. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Republic Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

(c) inability to fully use trucks to move iron ore to its Warren and Youngstown, Ohio mills?

Yes ___ No √

CLAIMS OF JONES & LAUGHLIN STEEL INCORPORATED

7. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Jones & Laughlin Steel Incorporated?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

(c) inability to fully use trucks to move iron ore to its Ohio, mills?

Yes ___ No √

CLAIMS OF WHEELING-PITTSBURGH STEEL CORPORATION

8. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wheeling-Pittsburgh Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

CLAIMS OF NATIONAL STEEL CORPORATION

9. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of National Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the utilization of self-unloading vessels for the delivery of iron ore?

Yes √ No ___

(b) inability to fully use private docks to handle iron ore?

Yes √ No ___

CLAIMS OF SHARON STEEL CORPORATION

10. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Sharon Steel Corporation?

Yes √ No ___

If Yes, did injury result from:

(a) foreclosure and/or delay in the use of self-unloading vessels for the delivery and unloading of iron ore?

Yes √ No ___

(b) foreclosure and/or delay in the use of independent docks to handle iron ore?

Yes √ No ___

(c) foreclosure and a delay in the use of trucks to move iron ore to its Farrell, Pennsylvania, mill?

Yes ___ No √

CLAIMS OF THE REANEY PLAINTIFFS

11. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Reaney?

Yes __ No √

If Yes, did injury result from:

(a) acts to prevent the Reaneys from engaging in an iron ore business at Grand River?

Yes __ No √

(b) acts to prevent the Reaneys from engaging in an iron ore business at the Minnesota slip?

Yes __ No √

CLAIMS OF ERIE-WESTERN PENNSYLVANIA

PORT AUTHORITY AND CODAN CORPORATION

12. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of the Erie plaintiffs?

Yes √ No ___

If Yes, did injury result from:

(a) acts to prevent the Erie from subleasing or purchasing the Erie ore dock?

Yes √ No ___

(b) acts to prevent Erie from having competitive iron ore rail rates at the Erie ore dock?

Yes √ No ___

CLAIMS OF C.D. AMBROSIA
TRUCKING COMPANY

13. Was the unlawful conspiracy a material cause of any injury to the business or property of the C.D. Ambrosia Trucking Company?

Yes √ No ___

If "Yes," did injury result from:

(a) acts to remove hopper cars from steel mills or otherwise cramp and impede truck transportation of iron ore?

Yes ___ No √

(b) acts to discourage or prevent truck transportation of iron ore from railroad-owned docks?

Yes ___ No √

(c) acts to prevent truck transportation of iron ore from Minnesota slip dock by use of a lease restriction prohibiting trucking from that dock?

Yes ___ No √

(d) acts to prevent or delay iron ore handling by private docks that would permit trucking of iron ore?

Yes √ No ___

CLAIM OF TAURO BROTHERS TRUCKING COMPANY

14. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Tauro Brothers?

Yes √ No ___

If Yes, did injury result from:

(a) denial of access to railroad docks to truck iron ore?

Yes ___ No √

(b) foreclosure and/or delay in the utilization of self-unloading vessels to be used to bring iron ore to docks to which truckers were allowed access?

Yes √ No ___

(c) inability of steel mills to fully use private docks, to which trucks were allowed access.

Yes √ No ___

CLAIMS OF THE WILLS COMPANIES

15. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wills' dock companies (Toledo World Terminals, Inc., and its predecessors, Consolidated Dock, Inc. and Consolidated Dock & Storage, Inc.)?

Yes √ No ___

If Yes, did any such injury result from:

(a) acts in furtherance of the conspiracy, including the refusal to lease dock property without restrictions, to prevent Wills from engaging in an iron ore business at the Minnesota slip (Ashtabula)?

Yes ___ No √

(b) acts in furtherance of the conspiracy, including the refusal to lease dock property, to prevent Wills from engaging in an iron ore business at Whiskey Island (Cleveland)?

Yes ___ No √

(c) acts in furtherance of the conspiracy, including the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, to prevent Wills from engaging in an iron ore business at Toledo, Ohio?

Yes √ No ___

16. Was the agreement, combination or conspiracy a material cause of any injury to the business or property of Wills Trucking, Inc. because it was unable to provide a trucking service in combination with Wills' dock services?

Yes √ No ___

CONCEALMENT

17. Did any participant in the unlawful conspiracy take affirmative acts to conceal the conspiracy, or to conceal any act in furtherance of the conspiracy?

Yes √ No ___

If you answered "Yes" to question 17, answer question 18.

18. Have the following plaintiffs shown that they did not have actual knowledge of the unlawful conspiracy prior to October 14, 1977 and did not have knowledge of facts prior to that time which, through the exercise of due diligence, should have caused them to discover the unlawful conspiracy?

(Answer as to each plaintiff.)

(a) C.D. Ambrosia Trucking Co., Inc.

Yes √ No ___

(b) Erie-Western Pennsylvania Port Authority and Codan Corporation

Yes ___ No √

(c) Reaney Dock Company and David W. Reaney, individually or on behalf of Warford Reaney

Yes √ No

(d) Tauro Brothers Trucking Co.

Yes √ No ___

(e) Wills Trucking Co. and Toledo World Terminal, Inc., including Consolidated Dock and Storage, Inc. and Consolidated Dock, Inc.

Yes √ No ___

19. If you have found that the defendant violated the antitrust laws, state whether each act in furtherance of the agreement, combination or conspiracy was taken in a good faith belief that it was required by ICC regulations.

Yes ___ No √

20. Was defendant's conduct reasonable under the circumstances, including possible justification under the regulatory policies under which defendant operated?

Yes ___ No √

QUESTIONS TO BE ANSWERED BY THE JURY

DAMAGE CLAIMS OF REPUBLIC STEEL CORPORATION

1. State the amount of damages that will fairly and reasonably compensate Republic Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Self-Unloader Damages	$ 13,100,000
(ii) Dock Damages	$ 5,300,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Self-Unloader Damages	$ 60,600,000
(ii) Dock Damages	$ 8,000,000

DAMAGE CLAIMS OF JONES & LAUGHLIN
STEEL INCORPORATED
(INCLUDING YOUNGSTOWN SHEET &
TUBE COMPANY)

2. State the amount of damages that will fairly and reasonably compensate Jones & Laughlin Steel Incorporated, including Youngstown Sheet & Tube Company, for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Self-Unloader Damages	$ 25,900,000
(ii) Dock Damages	$ 6,900,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Self-Unloader Damages	$ 39,000,000
(ii) Dock Damages	$ 3,700,000

DAMAGE CLAIMS OF WHEELING-PITTSBURGH STEEL CORPORATION

3. State the amount of damages that will fairly and reasonably compensate Wheeling-Pittsburgh Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Self-Unloader Damages	$ 7,100,000
(ii) Dock Damages:	
Material Handling	$ 4,400,000
Demurrage	$ 1,300,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Self-Unloader Damages	$ 7,800,000
(ii) Dock Damages:	
Material Handling	$ 5,300,000
Demurrage	$ 1,000,000

DAMAGE CLAIMS OF NATIONAL STEEL CORPORATION

4. State the amount of damages that will fairly and reasonably compensate National Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the utilization of self-unloader vessels for the delivery of iron ore and (ii) inability to fully use private docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i)	Material Handling (Dock) Damages	$ 2,200,000
(ii)	Vessel Operating Cost Savings	$ 10,000,000
(iii)	Great Lakes In-Plant Handling Savings	$ 1
(iv)	Investment Cost Savings	$ 10,400,000

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i)	Material Handling (Dock) Damages	$ 3,400,000
(ii)	Vessel Operating Cost Savings	$ 4,400,000
(iii)	Great Lakes In-Plant Handling Savings	$ 1
(iv)	Investment Cost Savings	$ 6,300,000

DAMAGE CLAIMS OF SHARON STEEL CORPORATION

5. State the amount of damage that will fairly and reasonably compensate Sharon Steel Corporation for injury to its business or property resulting from (i) foreclosure and/or delay in the use of self-unloading vessels for the delivery and unloading of iron ore and (ii) foreclosure and/or delay in the use of independent docks to handle iron ore.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Material Handling (Dock) Damages $ 3,700,000

(ii) Self-Unloader Premium Damages $ 1

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Material Handling (Dock) Damages $ 1,400,000

(ii) Self-Unloader Premium Damages $ 1

DAMAGE CLAIMS OF ERIE WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION

6. State the amount of damages that will fairly and reasonably compensate the Erie plaintiffs for injury to their business or property resulting from (i) acts to prevent Erie from subleasing or purchasing the Erie ore dock and (ii) acts to prevent Erie from obtaining competitive iron ore rail rates from the Erie ore dock.

(Answer for each time period and for each category of damages)

(a) Damage Period I

(Jan. 1, 1968 - Oct. 13, 1977)

(i) Lost Profit Damages	$ 1,700,000
(ii) Opportunity Cost Damages	$ 1

(b) Damage Period II

(Oct. 14, 1977 - Dec. 31, 1983)

(i) Lost Profit Damages	$ 5,000,000
(ii) Opportunity Cost Damages	$ 1

DAMAGE CLAIMS OF C. D. AMBROSIA TRUCKING COMPANY

7. State the amount of damages that will fairly and reasonably compensate C. D. Ambrosia Trucking Company for injury to its business or property (during the period January 1, 1965 - December 31, 1979) resulting from acts to prevent or delay iron ore handling by non-railroad docks that would permit trucking of iron ore.

(Answer for each time period and for each category of damages)

(a)	Lost Profit Damages	$ 1,800,000
(b)	Opportunity Cost Damages	$ 1

DAMAGE CLAIMS OF TAURO BROTHERS TRUCKING COMPANY

8. State the amount of damages that will fairly and reasonably compensate Tauro Brothers Trucking Company for injury to its business and property resulting from (i) foreclosure and/or delay in the utilization of self-unloading vessels to be used to bring ore to docks to which truckers were allowed access and (ii) inability of steel mills to fully use independent docks to which truckers were allowed access.

(a)	Lost Profit Damages	$ 3,800,000
(b)	Opportunity Cost Damages	$ 1

DAMAGE CLAIMS OF THE WILLS COMPANIES

9. State the amount of damages that will fairly and reasonably compensate Wills' dock companies (Toledo World Terminal, Inc. and its predecessor, Consolidated Dock, Inc.) for injury to its business or property resulting from acts in furtherance of the conspiracy, including the refusal to lease or sell dock properties or the refusal to lease or sell dock properties without restrictions, that prevented Wills from engaging in an iron ore business at Toledo for Armco.

Dock Damages: $ 1

10. State the amount of damages that will fairly and reasonably compensate Wills Trucking, Inc. for injury to its business or property resulting from being deprived of the opportunity to provide a trucking service to Armco in combination with Wills' dock services.

Trucking Damages: $ 1